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Finally, private or public pressure might be brought to bear against material that sexualizes violence, especially when the material appears on television or in movies. A promising model is provided by an innovative measure enacted through the initiative of Senator Paul Simon in 1990. n144 Senator Simon's statute exempts from the antitrust laws any effort by the television networks to reduce violence on television. This measure does not require any agreement among the networks. It does not censor any speech. n145 But it does say that an agreed-upon set of principles will not violate the antitrust laws. In this way, it encourages networks to reach agreements that would otherwise be unlawful.

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n144 Television Program Improvement Act of 1990, Pub L No 101-650, Title V, 501, 104 Stat 5127 (Dec 1, 1990), codified at 47 USC 303(c) (Supp 1992).

n145 There is, however, a possible First Amendment issue under the R.A.V. decision. It would clearly be unlawful to exempt from the antitrust laws any agreement to limit criticism of the President. The question then becomes whether a subject matter exemption, limited to violence, is unacceptably selective in the same sense as the law invalidated by the R.A.V. Court. I do not believe that there is unacceptable selectivity in the light of the absence of viewpoint discrimination, the plausibility of the claim of harm, and the lack of reason for suspicion about viewpoint discrimination.

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The Simon initiative is especially valuable insofar as it recognizes that competition for viewers can lead to an undesirable state of affairs, one in which there is an increasing incidence of violence. In late 1992, the networks did indeed reach a shared set of principles. n146 The agreement should significantly affect programming in 1993 and after. Among other things, the new principles say that programs should not depict violence as glamorous or as an acceptable solution to human conflict; should avoid gratuitous violence; and should avoid mixtures of sex and violence. Perhaps it will be possible to build on this idea to counteract some of the problems of the broadcasting media, without resorting to government regulation at all. [*843]

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n146 Matt Marshall and John Lippman, Big 3 Networks Agree to "Limit" Violence on TV, LA Times A1 (Dec 12, 1992).

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## CONCLUSION

I have made three claims in this Essay. First, certain narrowly defined categories of pornography and hate speech can be regulated consistently with the First Amendment. They count as "low value" speech, and they cause sufficient harms to be regulable under existing standards. Broadly speaking, the argument for regulating pornography is stronger than the corresponding argument for regulating hate speech, on both the value and the harm sides; but some well-defined categories of hate speech might be subject to legal controls. Second, the prominent objections from neutrality are misplaced. Some

regulations of pornography and hate speech can be neutrally justified, even if they appear discriminatory on the basis of content, subject matter, or even viewpoint. They can be neutrally justified in large part because of the anticaste principle. Third, we should jettison the "speech-conduct" distinction in favor of an approach that explores whether the symbols at issue are intended and received as a contribution to the exchange of ideas about some issue.

Under this approach, flag-burning, cross-burning, and much else will qualify as speech, though it may be bannable because of sufficiently neutral justifications. Under this approach, moreover, some "words" do not qualify as speech, because they amount to a way of committing an independently unlawful act. These claims raise many questions and leave a number of ambiguities. But they will resolve the vast majority of issues raised by government regulation of pornography and hate speech and help orient treatment of the rest.

I have also outlined a number of possible approaches for those who seek to prevent the harms produced by pornography, hate speech, and hate crimes. A particular priority is to attack those harms through measures that (a) do not implicate speech at all and (b) are content-neutral if they do implicate speech. Strategies of this kind cannot counteract all of the harms produced by hate speech and pornography. But they can do a great deal of good, and so long as Hudnut and R.A.V. stand as the law, they are, I suggest, among the best routes for the future.

A more general lesson follows from these claims. The concerns about pornography and hate speech are in one sense new, but in another sense very old; they recall the original goal of the Civil War Amendments: the elimination of caste systems. As I have emphasized, the caste-like features of current practices are not as severe as those of traditional caste systems, but they are nonetheless [*844] conspicuous. An important element of those practices consists of the disproportionate subjection of women and blacks to public and private violence and to frequent intrusions on their self-respect--the time-honored constitutional notion of stigma. n147 Many imaginable limits on sexually explicit materials and on racist speech would indeed violate the First Amendment. But, I suggest that narrow and well-defined legal controls on pornography and hate speech are simply a part of the attack on systems of racial and gender caste. If they are understood in this light, and if they are appropriately narrow and clear, they can operate without making significant intrusions into a well-functioning system of free expression.

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n147 Brown v Board of Education of Topeka, 347 US 483, 493-95 (1954).

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LEVEL 1 - 17 OF 96 ITEMS


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# Regulation of Hate Speech and Pornography After R.A.V.

Elena Kagan*

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* Assistant Professor of Law, The University of Chicago Law School. This Essay is based on remarks I made in a panel discussion at the conference, "Speech, Equality, and Harm: Feminist Legal Perspectives on Pornography and Hate Propaganda," held at The University of Chicago Law School on March 5-7, 1993. The argument has been expanded only slightly, and the reader is asked to make allowances for my necessarily abbreviated discussion of many complicated issues. I am grateful to Mary Becker, Larry Lessig, Michael McConnell, Geoffrey Stone, David Strauss, and Cass Sunstein for valuable advice and comments. The Class of "64 Fund and the Russell Parsons Faculty Research Fund at The University of Chicago Law School provided financial support.

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SUMMARY:
... This Essay on the regulation of hate speech and pornography addresses both practicalities and principles. ... I do claim that given the current strength of the viewpoint neutrality principle, a purely pragmatic approach to regulating hate speech and pornography would seek to use laws not subject to the viewpoint discrimination objection, while also seeking to justify--as exceptions--carefully crafted and limited departures from the rule against viewpoint regulation. ... The claim that pornography and hate-speech regulation is harm-based, rather than viewpoint-based, has an initial appeal, but turns out to raise many hard questions. The claim appeals precisely because it reflects an understanding of the value of a view point neutrality norm and a desire to maintain it: if pornography and hate-speech regulation is harm-based, then we can have both it and a rule against viewpoint discrimination. ... In the case of pornography, any ordinance should be limited to materials that operate primarily (as obscene materials operate primarily) as masturbatory devices; in addition, an explicit exception, like that in the obscenity standard, for works of serious value ought to be incorporated. ...

TEXT:

This Essay on the regulation of hate speech and pornography addresses both practicalities and principles. I take it as a given that we live in a society marred by racial and gender inequality, that certain forms of speech perpetuate and promote this inequality, and that the uncoerced disappearance of such speech would be cause for great elation. I do not take it as a given that all governmental efforts to regulate such speech thus accord with the

Constitution. What is more (and perhaps what is more important), the Supreme Court does not, and will not in the foreseeable future, take this latter proposition as a given either. If confirmation of this point were needed, it came last year in the shape of the Court's opinion in R.A.V. v City of St. Paul. n1 There, the Court struck down a so-called hate speech ordinance, in the process reiterating, in yet strengthened form, the tenet that the First Amendment presumptively prohibits the regulation of speech based upon its content, and especially upon its viewpoint. That decision demands a change in the nature of the debate on pornography and hate speech regulation. It does so for principled reasons--because it raises important and valid questions about which approaches to the regulation of hate speech and pornography properly should succeed in the courts. And it does so for purely pragmatic reasons--because it makes clear that certain approaches almost surely will not succeed.

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n1 112 S Ct 2538 (1992).

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In making this claim, I do not mean to suggest that all efforts to regulate pornography and hate speech be suspended, on the [*874] ground either of mistake or of futility. Quite the opposite. R.A.V. largely forecloses some lines of advocacy and argument (until now the dominant lines), as well perhaps it should have. But the decision leaves open alternative means of regulating some pornography and hate speech, or of alleviating the harms that such speech causes. The primary purpose of this Essay is to offer some of these potential new approaches for consideration and debate. The question I pose is whether there are ways to achieve at least some of the goals of the anti-pornography and anti-hate speech movements without encroaching on valuable and ever more firmly settled First Amendment principles. This Essay is just that--an essay, a series of trial balloons, which may be shot down, from either side or no side at all, by me or by others. The point throughout is to emphasize the range of approaches remaining available after R.A.V. and meriting discussion.

## I. THE PROBLEM OF VIEWPOINT DISCRIMINATION

In R.A.V., the Court struck down a local ordinance construed to prohibit those fighting words, but only those fighting words, based on race, color, creed, religion, or gender. n2 Fighting words long have been considered unprotected expression--so valueless and so harmful that government may prohibit them entirely without abridging the First Amendment. n3 Why, then, was the ordinance before the Court constitutionally invalid? The majority reasoned that the ordinance's fatal flaw lay in its incorporation of a kind of content-based distinction. The ordinance, on its very face, distinguished among fighting words on the basis of their subject matter: only fighting words concerning "race, color, creed, religion or gender" were forbidden. n4 More, and much more nefariously in the Court's view, the ordinance in practice discriminated between different viewpoints: it effectively prohibited racist and sexist fighting words, while allowing all others. n5 Antipathy to such viewpoint distinctions, the Court stated, lies at the heart of the guarantee of freedom of expression. "The government may not regulate speech based on hostility--or favoritism--towards the underlying [*875] message expressed"; it may not suppress or handicap "particular ideas." n6

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n2 Id at 2542. The Supreme Court defined "fighting words" in Chaplinsky v New Hampshire, 315 US 568, 572 (1942), as words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace."

n3 Chaplinsky, 315 US at 572.

n4 R.A.V., 112 S Ct at 2541, 2547.

n5 Id at 2547-48.

n6 Id at 2545, 2549.

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The reasoning in R.A.V. closely resembles that found in the key judicial decision on the regulation of pornography. In American Booksellers Ass'n, Inc. v Hudnut, n7 affirmed summarily by the Supreme Court, the United States Court of Appeals for the Seventh Circuit invalidated the Indianapolis anti-pornography ordinance drafted by Andrea Dworkin and Catharine MacKinnon. That ordinance declared pornography a form of sex discrimination, with pornography defined as "the graphic sexually explicit subordination of women, whether in pictures or in words," that depicted women in specified sexually subservient postures. n8 The core problem for the Seventh Circuit, as for the Supreme Court in R.A.V., was one of viewpoint discrimination. The ordinance, according to the Court of Appeals, made the legality of expression "depend ent on the perspective the author adopts." n9 Sexually explicit speech portraying women as equal was lawful; sexually explicit speech portraying women as subordinate was not. The ordinance, in other words, "establishe d an "approved' view" of women and of sexual relations. n10 From this feature, invalidation necessarily followed: "The state may not ordain preferred viewpoints in this way. The Constitution forbids the state to declare one perspective right and silence opponents." n11

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n7 771 F2d 323 (7th Cir 1985), aff'd mem, 475 US 1001 (1986).

n8 Id at 324.

n9 Id at 328.

n10 Id.

n11 Id at 325.

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The approach used in R.A.V. and Hudnut has a large body of case law behind it. The presumption against viewpoint discrimination did not emerge alongside of, or in response to, the effort to curtail certain forms of racist and sexist expression. Rather, that presumption long has occupied a central position in First Amendment doctrine. Decades ago, for example, the Supreme Court employed the presumption to strike down laws restricting expression that discredited

the military or that presented adultery in a favorable light, and more recently, the Court invoked the presumption to invalidate flag-burning statutes. n12 This is not to say that the Court invariably has invalidated laws that incorporate view [*876] point favoritism. Exceptions to the rule exist, although the Court rarely has seen fit to acknowledge them as such; in a number of areas of First Amendment law (and especially when so-called lowvalue speech is implicated), the Court breezily has ignored both more and less obvious forms of viewpoint preference. n13 Still, the rule has been more often honored than honored in the breach, and the Supreme Court's opinion in R.A.V., as well as its summary affirmance of Hudnut, could have been expected.

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n12 See Schacht v United States, 398 US 58, 67 (1970) (military); Kingsley Int'l Pictures Corp. v Regents, 360 US 684, 688 (1959) (adultery); Texas v Johnson, 491 US 397, 416-17 (1989) (flag-burning); United States v Eichman, 496 US 310, 317-18 (1990) (same).

n13 Several examples of this blindness to viewpoint discrimination occur in the area of commercial speech. See Posadas de Puerto Rico Associates v Tourism Co. of Puerto Rico, 478 US 328, 330-31 (1986) (upholding a law prohibiting advertising of casino gambling, but leaving untouched all speech discouraging such gambling); Central Hudson Gas & Electric v Public Service Commission, 447 US 557, 569-71 (1980) (striking down a broad law prohibiting advertising to stimulate the use of electricity, but suggesting that a more narrowly-tailored law along the same lines would meet constitutional standards, even if the law were to allow all expression discouraging use of electricity). In addition, as Catharine MacKinnon has noted, the delineation of entire low-value categories of speech, such as obscenity and child pornography, may be thought to reflect a kind of viewpoint discrimination, given that the speech falling within such categories likely expresses a single (disfavored) viewpoint about sexual matters. See Catharine A. MacKinnon, Feminism Unmodified: Discourses on Life and Law 212 (Harvard, 1987). Further discussion of this point, and its relevance for the regulation of pornography and hate speech, appears in note 73 and the text accompanying note 80. Finally, the Court has indicated that the usual presumption against viewpoint discrimination does not apply, or at least does not apply in full force, when the government engages in selective funding of speech, rather than selective restriction of speech. See Rust v Sullivan, 111 S Ct 1759, 1772-73 (1991); text accompanying notes 28-29.

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Moreover, the Court's decision in R.A.V. entrenched still further the presumption against viewpoint-based regulation of speech. To be sure, the majority opinion received only five votes and came under vehement attack from the remaining Justices. n14 Thus, some might reason that the disposition of the case reveals a weakening in the Court's commitment to viewpoint neutrality, either across the board or with respect to racist and sexist expression. If this reasoning were valid, those disliking R.A.V. might simply wait and pray for an advantageous change in the Court's membership. But any such reading of the case rests on a grave misunderstanding. The Court's opinion received the support of only a bare majority because, for two reasons having nothing to do with the particular viewpoint involved, the case appeared to some Justices not to invoke the presumption against viewpoint regulation at all. First, [*877] and most important, the alleged viewpoint discrimination in the case occurred within a

category of speech--fighting words--that the Court long ago declared constitutionally unprotected. Second, the viewpoint discrimination found in the ordinance existed not on its face, but only in application--and even in application, only with a fair bit of argument. n15 Had the law distinguished on its face between racist (or sexist) speech and other speech outside the category of fighting words, the Court's decision likely would have been unanimous. n16 What R.A.V. shows, then, is the depth, not the tenuousness, of the Court's commitment to a viewpoint neutrality principle. And what R.A.V. did, in applying that principle to a case of non-facial discrimination in an unprotected sphere, was to render that principle even stronger.

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n14 The four Justices who refused to join the Court's opinion also voted to invalidate the St. Paul ordinance, but only because of a concern about overbreadth that easily could have been corrected. They assailed the majority's conclusion that the presumption against viewpoint discrimination mandated invalidation of the statute, either on the view that the presumption failed to operate in spheres of unprotected speech, see 112 S Ct at 2551-54 (White concurring) and id at 2560 (Blackmun concurring), or on the view that the ordinance incorporated no viewpoint-based distinction, see id at 2570-71 (Stevens concurring).

n15 The St. Paul ordinance, on its face, discriminated only on the basis of subject matter, as the Court conceded. For the dispute on whether the ordinance applied in a viewpointdiscriminatory manner, contrast the majority opinion, 112 S Ct at 2547-48, with the concurring opinion of Justice Stevens, id at 2570-71. Contrast also Cass R. Sunstein, On Analogical Reasoning, 106 Harv L Rev 741, 762-63 & n 78 (1993) (R.A.V. ordinance not viewpointbased in practice), with Elena Kagan, The Changing Faces of First Amendment Neutrality: R.A.V. v St. Paul, Rust v Sullivan, and the Problem of Content-Based Underinclusion, 1992 S Ct Rev 29, 69-71 (R.A.V. ordinance viewpoint-based in practice).

n16 See note 14 for a description of the concurring Justices' objections to the Court's decision. In the case hypothesized in the text, those objections would have evaporated.

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Any attempt to regulate pornography or hate speech--or at least any attempt standing a chance of success--must take into account these facts (the "is," regardless whether the "ought") of First Amendment doctrine. A law specifically disfavoring racist or sexist speech (or, to use another construction, a law distinguishing between depictions of group members as equal and depictions of group members as subordinate) runs headlong into the longstanding, and newly revivified, principle of viewpoint neutrality. I do not claim that exceptions to this principle will never be made, or even that such exceptions will not be made by the current Court. Exceptions, as noted previously, have been recognized before (even if not explicitly); they doubtless will be recognized again; and in the last section of this Essay, I consider briefly whether and how to frame them. I do claim that given the current strength of the viewpoint neutrality principle, a purely pragmatic approach to regulating hate speech and pornography would seek to use laws not subject to the viewpoint discrimination objection, while also seeking to justify--as exceptions--carefully crafted and limited departures from the rule against viewpoint regulation. [*878]

This approach, in my view, also best accords with important free speech principles (the "ought" in the "is" of First Amendment doctrine). A focus on the feasible is arguably irresponsible if the feasible falls desperately short of the proper. But here, I think, that is not the case. If reality--the current state of First Amendment doctrine--counsels certain proposals and not others, certain lines of argument and not others, so too do important values embodied in that doctrine. More specifically, the principle of viewpoint neutrality, which now stands as the primary barrier to certain modes of regulating pornography and hate speech, has at its core much good sense and reason. Although here I can do no more than touch on the issue, my view is that efforts to regulate pornography and hate speech not only will fail, but also should fail to the extent that they trivialize or subvert this principle.

Those who have criticized the courts for using the viewpoint neutrality principle against efforts to regulate pornography or hate speech usually have offered one of two arguments. First, some have claimed that such efforts comport with the norm of viewpoint neutrality because they are based on the harm the speech causes, rather than the viewpoint it espouses. n17 Second, and more dramatically, some have challenged the norm itself as incoherent, worthless, or dangerous. n18 Both lines of argument have enriched discussion of the viewpoint neutrality principle, by challenging the tendency of such discussion to do nothing more than apotheosize. Yet both approaches, in somewhat different ways, slight the reasons and values underlying current First Amendment doctrine--including the decisions in R.A.V. and Hudnut.

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n17 See, for example, Cass R. Sunstein, Pornography and the First Amendment, 1986 Duke L J 589, 612; MacKinnon, Feminism Unmodified at 212 (cited in note 13). See also R.A.V., 112 S Ct at 2570 (Stevens concurring). Professor Sunstein always has combined this argument with a fuller analysis of when exceptions to the viewpoint regulation doctrine are justified; for him, the ability to classify a law as harm-based seems not the end, but only the start of the inquiry. See Cass R. Sunstein, Words, Conduct, Caste, 60 U Chi L Rev 795, 796 (1993) (in this issue). My brief discussion, in Section II of this Essay, on whether and when to recognize such exceptions owes much to his work on the subject.

n18 See Mary Becker, Conservative Free Speech and the Uneasy Case for Judicial Review, 64 U Colo L Rev 975, 1044-47 (1993) (arguing that a viewpoint neutrality norm harms women and minority groups); MacKinnon, Feminism Unmodified at 210-13 (cited in note 13) (challenging the ability to identify viewpoint regulation except by reference to social consensus).

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The claim that pornography and hate-speech regulation is harm-based, rather than viewpoint-based, has an initial appeal, but turns out to raise many hard questions. The claim appeals precisely because it reflects an understanding of the value of a view [*879] point neutrality norm and a desire to maintain it: if pornography and hate-speech regulation is harm-based, then we can have both it and a rule against viewpoint discrimination. n19 But the two yearnings may not be so easy to accommodate, for it is not clear that the classification proposed can support much weight. It is true that statutory language can focus either on the viewpoint of speech or on the injury it causes: contrast an

ordinance that prohibits "sexually explicit materials approving the subordination of women" with an ordinance that prohibits "sexually explicit materials causing the subordination of women." n20 But if we assume (as a meaningful system of free speech must) that speech has effects--that the expression of a view will often cause people to act on it--then the two phrasings should be considered identical for First Amendment purposes. To grasp this point, consider here a few further examples. Contrast a law that prohibits criticism of the draft with a law that prohibits any speech that might cause persons to resist the draft. n21 Or, to use a case with more contemporary resonance, contrast an ordinance punishing abortion advocacy and counseling with an ordinance punishing any speech that might induce a woman to get an abortion. To sever these pairs of statutes would be to transform the First Amendment into a formal rule of legislative drafting, concerned only with appearance. In all these cases, the facially harm-based statute and the facially viewpoint-based statute function in the same way, because it is speech of a certain viewpoint, and only of that viewpoint, which causes the alleged injury. The facially harm-based statute in these circumstances will curtail expression of a particular message as surely as will the statute that refers to the message in explicit language. Given this functional identity, the statutes properly are viewed as cognates. n22 [*880]

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n19 I suspect that a wish of this kind explains Justice Stevens's insistence in R.A.V. that the St. Paul ordinance regulated speech "not on the basis of . . . the viewpoint expressed, but rather on the basis of the harm the speech causes." 112 S Ct at 2570 (Stevens concurring). Both in R.A.V. and in numerous other opinions and articles, Justice Stevens has expressed unwavering support for the presumption against viewpoint regulation. For the most recent example, see The Hon. John Paul Stevens, The Freedom of Speech, 102 Yale L J 1293, 1309 (1993).

n20 The example, in slightly different form, appears in Geoffrey R. Stone, Anti-Pornography Legislation as Viewpoint-Discrimination, 9 Harv J L & Pub Pol 461, 467 (1986). As Stone points out, the MacKinnon-Dworkin ordinance, as written, is at any rate closer to the law focusing on the viewpoint espoused than to the law focusing on the harm caused. Id.

n21 This example also appears in Stone. Id.

n22 An argument to the contrary might rely not on the effects of the statutes, but on the intent of the legislature in passing them. The claim here would be that the facially harmbased statute more likely springs from a legitimate governmental motive than does the facially viewpoint-based statute. But this claim seems dubious in any case in which the statutes in fact operate in a similar manner. Because the legislators will know that the facially harm-based statute, like the facially viewpoint-based statute, will succeed in curtailing a specific message, their decision to phrase the statute in terms of harm (especially in light of a legal rule that effectively counsels them to do so) cannot provide a guarantee of legitimate intent.

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This equivalence does not by itself destroy the claim that pornography regulation is harm-based, because both versions of the law might be

characterized in this manner: so long as a legislature reasonably decides, as it surely could with respect to pornography, that speech causes harm, then regulation responding to that harm (however framed) might be considered neutral, rather than an effort to disfavor certain viewpoints. But this approach, too, makes any distinction between viewpoint-based regulation and harmbased regulation collapse upon itself. Using this analysis, almost all viewpoint-based regulation can be described as harm-based, responding neutrally not to ideas as such, but to their practical consequences. For it is difficult to see why anyone would opt to regulate a viewpoint that did not cause what seemed (to the regulators at least) to be a harm--or at a bare minimum, that could not reasonably be described as harmful. So, to return to the examples used above, a law prohibiting criticism of the draft could be termed harm-based given that such speech in fact produces draft resistance; or a law prohibiting abortion counseling and advocacy could be termed harm-based given that such speech in fact increases the incidence of abortion (which many would count a serious injury). The substitution of labels--"harm-based" for "viewpoint-based"--thus either allows most viewpoint regulation to go forward or leaves yet unanswered the central issue of precisely when such regulation is appropriate.

The more extreme critique of a case like Hudnut--that viewpoint discrimination doctrine is both incoherent and corrupt--is in many ways more difficult to counter. This critique rebels against the very core of First Amendment doctrine by accepting the government's power to suppress viewpoints as such whenever the viewpoints are thought to cause some requisite harm. n23 But the justification for this position includes at least one extremely potent point: that recognizing viewpoint regulation may well depend on the decisionmaker's viewpoint; more specifically, that a judicial [*881] decisionmaker will be least likely to recognize (or count as relevant) viewpoint regulation when the regulator's viewpoint lines up with his own. n24 This phenomenon may explain in part the willingness of courts to accept anti-obscenity laws at the same time as they strike down anti-pornography laws. n25 More generally, this epistemological problem may skew viewpoint discrimination doctrine, as it operates in practice, in favor of the status quo--resulting in the disproportionate approval of laws most reflective of traditional sentiment and the disproportionate invalidation of laws least so.

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n23 See MacKinnon, Feminism Unmodified at 212-13 (cited in note 13). Even under current First Amendment doctrine, the government may engage in viewpoint discrimination in emergency circumstances amounting to something like a clear and present danger. The critique discussed in the text would allow viewpoint regulation on a much less stringent showing.

n24 See id at 212; Becker, 64 U Colo L Rev at 1046-47 (cited in note 18).

n25 For discussion of the viewpoint bias inherent in obscenity laws, see notes 13 and 73 and text accompanying note 80.

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But even assuming this is true, I doubt that the appropriate response lies in undermining, let alone eliminating, the viewpoint discrimination principle. That principle grows out of two concerns, as meaningful today as ever in the past. n26 The first relates to the effects of viewpoint discrimination: such

action skews public debate on an issue by restricting the ability of one side (and one side only) to communicate a message. The second relates to governmental purposes: viewpoint regulation often arises from hostility toward ideas as such, and this disapproval constitutes an illegitimate justification for governmental action. Of course, particular instances of viewpoint discrimination may spring from benign purposes and have benign effects. Legislators may engage in viewpoint discrimination in an effort not to suppress ideas, but to respond to real harms; and the resulting damage to public discourse may signify little when measured against the harms averted. But how are the courts, or the people, or even legislators themselves to make these determinations of motive and effect in any given case? Will it not always be true that a benign motive can be assigned to governmental action? Will not any judgment as to relative harms depend on an evaluation of the message affected? From these questions, relating to the difficulty of evaluating particular purposes and effects, emerges a kind of rule-utilitarian justification for the ban on viewpoint discrimination.

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n26 The classic discussion of the bases for viewpoint discrimination doctrine is Geoffrey R. Stone, Content Regulation and the First Amendment, 25 Wm & Mary L Rev 189 (1983).

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The historic examples of the dangers of viewpoint discrimination, on the counts of both purpose and effect, are well-known and legion: the government's attempts, especially during World War I, to stifle criticism of military activities; its attempts in the 1950s to [*882] suppress support of Communism; its efforts, stretching over decades, to prevent the burning of American flags as a means of protesting the government and its policies. n27 And if all these seem remote either from current threats or from the kind of viewpoint regulation at issue in Hudnut and R.A.V.--if they seem the stories of another generation, with little relevance for today--consider instead the case of Rust v Sullivan, n28 previewed in earlier hypotheticals. There, the government favored anti-abortion speech over abortion advocacy, counseling, and referral, and the Court, to its discredit, announced that because the selectivity occurred in the context of a governmental funding program, the presumption against viewpoint discrimination was suspended. n29 Or instead consider the numerous ways in which some of the strange bedfellows of anti-pornography feminists (and one must admit their presence) might choose (indeed, have chosen) to attack the expression of, among others, gays and lesbians.

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n27 See Akhil Reed Amar, The Supreme Court, 1991 Term--Comment: The Case of the Missing Amendments: R.A.V. v. City of St. Paul, 106 Harv L Rev 124 (1992), for a comparison of R.A.V. and the Court's most recent flag-burning cases, Texas v Johnson, 491 US 397 (1989), and United States v Eichman, 496 US 310 (1990).

n28 111 S Ct 1759 (1991).

n29 Id at 1771-73. For a comparison of Rust and R.A.V., see Kagan, 1992 S Ct Rev 29 (cited in note 15).

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The key point here is only strengthened by the insight that viewpoint discrimination doctrine, as applied by the courts, has a way of producing some patterned inconsistencies; or to put this another way, the very critique of the Court's viewpoint discrimination doctrine exposes the need for a viewpoint neutrality principle. For what the critique highlights is the tendency of governmental actors (of all kinds) to see speech regulation through the lens of their own orthodoxies, as well as the ease with which such orthodoxies can thereby become entrenched. Recognition of this process lies at the very core of the viewpoint discrimination doctrine: as Justice Stevens recently has noted, that doctrine responds, preeminently, to fear of the "imposition of an official orthodoxy," n30 even (or perhaps especially) as to matters involving sex or race. That judicial decisionmakers, in applying the doctrine, sometimes will succumb to the views they hold hardly argues in favor of granting carte blanche to legislative decisionmakers to bow to theirs. It is difficult to see how women and minorities, who have the most to lose from the establishment of political orthodoxy, [*883] would gain by jettisoning the First Amendment doctrine that most protects against this prospect.

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n30 Stevens, 102 Yale L J at 1304 (cited in note 19).

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None of this discussion, of course, denies either the possibility or the desirability of crafting carefully circumscribed exceptions to First Amendment norms of viewpoint neutrality, and in the last section of this Essay, I briefly consider whether and how this task might be accomplished. Perhaps more important, none of this discussion gainsays the possibility of responding to the harms of pornography and hate speech through measures that do not contravene these norms. It is surely these measures, viewed from a pragmatic perspective, that stand the best chance of succeeding. And it usually will be these measures that pose the least danger to free speech principles. I turn, then, to a consideration of such proposals, less with the aim of making specific recommendations than with the aim of injecting new questions into the debate on hate speech and pornography regulation.

## II. NEW APPROACHES

I canvass here four general approaches; each is capable of encompassing many specific proposals. The four approaches are, in order: (1) the enactment of new, or the stricter use of existing, bans on conduct; (2) the enactment of certain kinds of viewpointneutral speech restrictions; (3) the enhanced use of the constitutionally unprotected category of obscenity; and (4) the creation of carefully supported and limited exceptions to the general rule against viewpoint discrimination. The proposals I outline within these approaches are meant to be illustrative, rather than exhaustive. Many fall well within constitutional boundaries; others test (or, with respect to the fourth approach, directly challenge) the current parameters. The latter proposals raise hard questions relating to whether they (no less than the standard viewpoint-based regulation) too greatly subvert principles necessary to a system of free expression. I will touch on many of these questions, although I cannot give them the extended treatment they merit.

A. Conduct

The most obvious way to avoid First Amendment requirements is to regulate not speech, but conduct. Recently, some schol [*884] ars have sought to meld these two together. n31 Speech is conduct, they say, because speech has consequences (speech, that is, "does" something); or conduct is speech because conduct has roots in ideas (conduct, that is, "says" something). I use these terms in a different sense. When "conduct" becomes a synonym for "speech" (or "speech" for "conduct"), the command of the First Amendment becomes incoherent; depending on whether the paradigm of conduct or speech holds sway, government can regulate either almost everything or almost nothing. The speech/conduct line is hard to draw, but it retains much meaning in theory, and even more in practice. When I say "conduct," then, I mean acts that, in purpose and function, are not primarily expressive. n32 The government can regulate such acts without running afoul of the First Amendment. n33 Here, I discuss two specific kinds of conduct regulation: the continued enactment and use of hate crimes laws and the increased application of legal sanctions for acts commonly performed in the making of pornography.

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n31 See MacKinnon, Feminism Unmodified at 129-30, 193-94 (cited in note 13); Charles R. Lawrence III, If He Hollers Let Him Go: Regulating Racist Speech on Campus, 1990 Duke L J 431, 438-44.

n32 The approach, in focusing on expressive quality, is similar to the analysis that Cass Sunstein presents in these pages. See Words, Conduct, Caste, 60 U Chi L Rev at 807-09 (cited in note 17). See also Amar, 106 Harv L Rev at 133-39 (cited in note 27). Of course, as sketched here, the definition begs all kinds of questions about when acts, either in purpose or in function, are primarily expressive.

n33 So, for example, it goes without saying that the City of St. Paul could have proceeded against the juvenile offenders in R.A.V. through the law of trespass. See R.A.V., 112 S Ct at 2541 n 1 (listing other statutes under which the offenders could have been punished).

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The typical hate crimes law, as the Supreme Court unanimously ruled last Term, presents no First Amendment problem. n34 Hate crimes laws, as usually written, provide for the enhancement of criminal penalties when a specified crime (say, assault) is committed because of the target's race, religion, or other listed status. n35 These laws are best understood as targeting not speech, but acts--because they apply regardless whether the discriminatory conduct at issue expresses, or is meant to express, any sort of message. In this way, hate crimes laws function precisely as do other discrimination laws--for example, in the sphere of employment. n36 [*885] When an employer fires an employee because she is black, the government may impose sanctions without constitutional qualm. This is so even when the discharge is accomplished (as almost all discharges are) through some form of expression, for whatever expression is involved is incidental both to the act accomplished and to the government's decision to prevent it. n37 The analysis ought not change when a person assaults another because she is black, once again even if the conduct (assault on the basis of race) is accompanied by expression. A penalty enhancement

constitutionally may follow because it is pegged to an act--a racially-based form of disadvantage--that the state wishes to prevent, and has an interest in preventing, irrespective of any expressive component. In other words, in the assault case, no less than in the discharge case, the government decides to treat race-based acts differently from similar non race-based acts; and in the assault case, no less than in the discharge case, this decision--a decision to prevent disproportionate harms from falling on members of a racial group--bears no relation to whether the race-based act communicates a message. Thus might end the constitutional analysis.

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n34 Wisconsin v Mitchell, 113 S Ct 2194 (1993).

n35 See, for example, Cal Penal Code 422.7 (West 1988 & Supp 1993); NY Penal Law 240.30(3) (McKinney Supp 1993); Or Rev Stat 166.165(1)(a)(A) (1991); Wis Stat Ann 939.645 (West Supp 1992).

n36 The Supreme Court in Mitchell noted the precise analogy between Title VII and the hate crimes statute at issue in the case. See 113 S Ct at 2200. It is noteworthy that both laws apply not only irrespective of whether the discrimination at issue expresses a message, but also irrespective of whether the discrimination is caused by particular beliefs. If, for example, discrimination laws prohibited discharges or assaults motivated by racial hatred--rather than simply based on race--they would pose a very different, and seemingly severe, First Amendment problem.

n37 Cass Sunstein makes this point in Words, Conduct, Caste, 60 U Chi L Rev at 827-28; his phrasing is that in such a case, the communication is merely evidence of, or a means of committing, an independently unlawful act. Professor Sunstein, however, appears to think that this analysis fails to cover hate crimes, because there the state's interest arises from the expressive nature of the conduct. As stated in the text, I do not believe this to be the case. A state has a legitimate interest in preventing, say, assaults on the basis of race, even when they are wholly devoid of expression. The interest is the same as the one in preventing discharges on the basis of race; it is an interest in eradicating racially-based forms of disadvantage generally, whether or not accompanied by communication of a message.

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Perhaps, however, this argument is not quite so easy as I have made it out to be. It might be said, in response, that racially-based assaults, more often than racially-based discharges, are committed in order to make a statement. If this is true, a penalty enhancement not only will restrict more speech incidentally, but also may raise a concern that the government is acting for this very purpose. Or perhaps it might be said, more generally, that the use of a discriminatory motive to define an act, even supposing the act has no expressive component, at times may be highly relevant to First Amendment analysis: consider, for example, a penalty enhancement provision applicable to persons who obstruct voting on the basis of a voter's affiliation with the Republican Party. [*886]

But both of these objections seem to falter on further consideration of the nature of hate crimes regulation and the governmental interest in it. The

voting obstruction law I have hypothesized (no less than a hate crimes law) applies to conduct regardless of whether it has expressive content, but the government's interest in the law always in a certain sense relates to expression: it is difficult to state, let alone give credence to, any interest the government could have, other than favoring or disfavoring points of view, for specially penalizing voting obstruction based on affiliation with a particular political party. n38 In the case of hate crimes laws, by contrast, the government not only is regulating acts irrespective of their expressive component, but also has a basis for doing so that is unrelated to suppressing (or preferring) particular views or expression--the interest, once again, in preventing conceded harms from falling inequitably on members of a particular racial group. In such a case, the regulation should be found to accord with First Amendment requirements, notwithstanding that it incidentally affects some expression. As the Court in R.A.V. noted, in referring to employment discrimination laws, "Where the government does not target conduct on the basis of its expressive content,"--and where, we might add, the government, in regulating conduct, has a credible interest that is unrelated to favoring or disfavoring certain ideas or expression--"acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." n39

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n38 The hypothetical voting law might seem very different if enhanced penalties applied to obstruction based on the voter's affiliation with any political party, rather than with the Republican Party alone. In enacting this broader law, the state could have determined that it had an interest in protecting persons from suffering disproportionate harm as a result of their political views, analogous to the interest in protecting persons from suffering disproportionate harm as a result of their race. Under the analysis suggested in the text, this new voting law would meet constitutional standards because it applies regardless whether the conduct communicates a message and because the government now has a credible interest in the law not related to favoring or disfavoring particular viewpoints and messages.

n39 112 S Ct at 2546-47.

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In accord with this reasoning, communities should be able not only to impose enhanced criminal sanctions on the perpetrators of hate crimes, but also to provide special tort-based or other civil remedies for their victims. One of the accomplishments of the antipornography movement has been to highlight the benefits of using the civil, as well as the criminal, laws to deter and punish undesirable activity. n40 Civil actions involve fewer procedural safeguards for the defendant, including a much reduced standard of proof; as [*887] important, they may give greater control to the victim of the unlawful conduct than a criminal prosecution ever can do. Communities therefore should consider not merely the enactment of hate crimes laws, but also the provision of some kind of "hate torts" remedies. And in determining the scope of all such laws, communities should consider the manner in which the laws apply to crimes or civil violations committed on the basis of sex, which now often fall outside the compass of hate crimes statutes.

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n40 See Catharine A. MacKinnon, Pornography, Civil Rights, and Speech, 20 Harv CR- CL L Rev 1, 29 n 52 (1985).

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To address the harms arising from pornography, the government has numerous available mechanisms that regulate not speech, but conduct. At an absolute minimum, states can prosecute actively, under generally applicable criminal laws, the sexual assaults and other violent acts so frequently committed against women in the making of pornography. Similarly, as Judge Easterbrook suggested in Hudnut, states may specifically make illegal (if they have not already) the use of fraud, trickery, or force to induce people to perform in any films, without regard to viewpoint. n41 Extensive regulation of such practices is the lot of many industries; the visual media surely are not entitled to any special exemption. With respect to regulatory effects of this kind too, responses based on the criminal law can be supplemented by enhanced tort remedies. n42

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n41 771 F2d at 332.

n42 For a discussion of whether the government, in addition to banning the conduct itself, may prohibit the dissemination of speech produced by means of this unlawful conduct, see text accompanying notes 55-61.

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A much more questionable means of deterring the production of pornographic works would be to press into service laws regulating prostitution, pimping, or pandering. In one recent case, an Arizona court upheld, against First Amendment challenge, the use of prostitution and pandering statutes against a woman who managed and performed in a sex show. n43 The court reasoned, consistent with established First Amendment doctrine, that the prosecutions were permissible because even if the show had expressive content, the state had acted under statutes directed at conduct in order to fur [*888] ther interests unrelated to the suppression of expression. n44 The same argument could be made whenever the government acts against a pornographer under a sufficiently broad pimping or pandering statute, so long as the prosecution were based on a significant interest unrelated to speech, such as the prevention of sexual exploitation. The problem with this analysis lies in its potential scope: many films that no one would deem pornographic contain sexual conduct by hired actors and thus fall within the very same statutes. Notwithstanding all I have said above, even the neutral application of a law that is not itself about speech might in some circumstances violate the First Amendment. (Consider, to use an extreme example, an environmental law imposing a ban on cutting down trees, as applied to producers of books and newspapers.) In all probability, the use of pimping and pandering statutes in the way I have just considered suffers from this constitutional defect, given the potential for applying such statutes to large amounts of speech at the core of constitutional protection.

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n43 Arizona v Taylor, 167 Ariz 429, 808 P2d 314, 315-16 (1990). The state's prostitution statute prohibited "engaging in or agreeing or offering to engage in sexual conduct with another person under a fee arrangement with that person

or any other person." Id. The use of statutes of this kind against women who merely perform in pornography raises a special concern: such prosecutions make a criminal of the very victim of exploitative practices. Moreover, these prosecutions may have little value: they are likely to deter the production of pornography far less well than prosecuting the actual pornographer under pimping, pandering, or other similar statutes, which essentially prohibit the hiring of persons to engage in sexual practices.

n44 Id at 317. The key case supporting this analysis is United States v O'Brien, 391 US 367 (1968), in which the Court approved the use of a statute prohibiting any knowing destruction of a Registration Certificate, purportedly enacted to further the efficient operation of the draft, against a person who had burned his draft card as part of a political protest.

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Those favoring the direct regulation of pornography often charge that relying exclusively on bans on conduct--most notably, a ban on coerced performances--would allow abuses currently committed in the manufacture of pornography to continue. n45 Such approaches, even if determinedly enforced, certainly will have less effect than banning pornography altogether. But once again, the most sweeping strategies also will be the ones most subject to constitutional challenge and the ones most subversive of free speech principles. An increased emphasis on conduct, rather than speech, provides a realistic, principled, and perhaps surprisingly effective alternative.

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n45 See, for example, Cass R. Sunstein, Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy), 92 Colum L Rev 1, 23-24 (1992).

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B. Viewpoint-Neutral Restrictions

The Supreme Court often has said that any speech restriction based on content, even if not based on viewpoint, presumptively violates the First Amendment. n46 But rhetoric in this instance is [*889] semi-detached from reality. The Court, for example, sometimes has upheld regulations based on the subject matter of speech. n47 And the Court in several cases has approved restrictions on non-obscene but sexually explicit or scatological speech. n48 Cases of this kind raise the possibility of eradicating the worst of hate speech and pornography through statutes that, although based on content, on their face (and, to the extent possible, as applied) have no viewpoint bias.

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n46 See, for example, Police Department of Chicago v Mosley, 408 US 92, 95-96 (1972); Simon & Schuster, Inc. v Members of the New York State Crime Victims Board, 112 S Ct 501, 508-09 (1991); Consolidated Edison Co. of New York v Public Service Commission of New York, 447 US 530, 536 (1980).

n47 See, for example, Burson v Freeman, 112 S Ct 1846 (1992); Greer v Spock, 424 US 828 (1976); CBS v Democratic National Committee, 412 US 94 (1973). See

generally Geoffrey R. Stone, Restrictions of Speech Because of its Content: The Peculiar Case of SubjectMatter Restrictions, 46 U Chi L Rev 81 (1978). R.A.V. might be thought to treat subject matter restrictions with the same distrust shown to viewpoint restrictions: the technical holding of the Court was that the St. Paul ordinance facially violated the Constitution "in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses." 112 S Ct at 2542. But elsewhere in the opinion, the Court made clear that its true concern related to viewpoint bias. What most bothered the Court was that the subject matter restriction operated in practice to restrict speech of only particular (racist, sexist, etc.) views. See, for example, id at 2547-49.

n48 See FCC v Pacifica Foundation, 438 US 726 (1978) (indecent radio broadcast); Young v American Mini-Theatres, 427 US 50 (1976) ("adult" theaters); City of Renton v Playtime Theatres, Inc., 475 US 41 (1986) (same).

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One potential course is to enact legislation, or use existing legislation, prohibiting carefully defined kinds of harassment, threats, or intimidation, including but not limited to those based on race and sex. For example, in considering the St. Paul ordinance, the Court in R.A.V. noted that the city could have achieved "precisely the same beneficial effect" through " a n ordinance not limited to the favored topics" n49 --that is, through an ordinance prohibiting all fighting words, regardless whether based on race, sex, or other specified category. An ordinance of this kind would have presented no constitutional issue at all given the Court's prior holdings that fighting words are a form of unprotected expression. n50 A law prohibiting, in viewpoint-neutral terms, not merely fighting words but other kinds of harassment and intimidation would (and should) face greater constitutional difficulties, relating most notably to overbreadth and vagueness; but a carefully drafted statute might well surmount these hurdles, and such a law surely would not be subject to the selectivity analysis of R.A.V. Viewpoint-neutral laws of this kind--whether framed in terms of fighting words or in some other manner--might be especially appropriate in com [*890] munities (such as, perhaps, educational institutions) whose very purposes require the maintenance of a modicum of decency. n51

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n49 112 S Ct at 2550.

n50 See Chaplinsky v New Hampshire, 315 US 568, 572 (1942). Of course, the application of the ordinance to any particular expression might well raise serious constitutional issues relating to the permissible scope of the fighting words category.

n51 See Robert C. Post, Racist Speech, Democracy, and the First Amendment, 32 Wm & Mary L Rev 267, 317-25 (1991), for a general discussion of the compatibility of speech regulation with the objectives of higher education.

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Another approach, relevant particularly to pornography, could focus on regulating materials defined in terms of sexual violence. At first glance,

R.A.V. and (especially) Hudnut seem to doom such efforts, but this initial appearance may be deceptive. The problem in Hudnut involved the way the ordinance under review distinguished between materials presenting women as sexual equals and materials presenting women as sexual subordinates: two works, both equally graphic, would receive different treatment because of different viewpoints. n52 This problem, the court suggested, would not arise if a statute instead were to classify materials according to their sexual explicitness. n53 Indeed, the Supreme Court already has said as much by treating as non-viewpoint-based (and sometimes upholding) regulations directed at even non-obscene sexually graphic materials. n54 If a regulation applying to sexually explicit materials does not raise concerns of viewpoint bias, perhaps neither does a regulation applying to works that are both sexually explicit and sexually violent.

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n52 See 771 F2d at 328.

n53 Id at 332-33.

n54 See note 48 and accompanying text. The Court has failed to indicate precisely when regulations of this kind, even assuming they are not viewpoint-based, will meet constitutional standards. All of the regulations upheld by the Court have involved not complete bans, but more limited restrictions. A law foreclosing such speech entirely would raise constitutional concerns of greater dimension.

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One counterargument might run that the reference to sexual violence in this hypothetical statute would function simply as a code word for a disfavored viewpoint: sexually violent materials present women as subordinates; sexually non-violent materials present women as equals; hence, the law replicates in covert language the faults of the MacKinnon-Dworkin ordinance. But this response strikes me as flawed, because many non-violent works present women as sexual subordinates, and some violent materials may not (violence is not necessarily a synonym for non-equality). The question is by no means free from doubt--much depends on how far the Court will or should go to find viewpoint discrimination in a facially neutral statute--but framing a statute along these lines seems worth consideration. [*891]

Finally, and once again of particular relevance to pornography, the Constitution may well permit direct regulation of speech, if phrased in a viewpoint-neutral manner, when the regulation responds to a non-speech related interest in controlling conduct involved in the materials' manufacture. Assume here, as discussed above, that the government has a strong interest in regulating the violence and coercion that often occurs in the making of pornography. n55 Does it then follow that the government may punish the distribution of materials made in this way as well as the underlying unlawful conduct? The Supreme Court's decision in New York v Ferber n56 suggests an affirmative answer. In Ferber, the Court sustained a statute prohibiting the distribution of any material depicting a sexual performance by a child, primarily on the ground that the law arose from the government's interest in preventing the conduct (sexual exploitation of children) necessarily involved in making the expression. Similarly, it would appear, the government may prohibit

directly the dissemination of any materials whose manufacture involved coercion of, or violence against, participants. The Hudnut Court specifically indicated that such a statute would meet constitutional requirements. n57

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n55 See text accompanying notes 41-42.

n56 458 US 747 (1982).

n57 See 771 F2d at 332-33.

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Important questions remain unanswered with respect to this approach, for there are almost surely limits on the principle that the government may engage in viewpoint-neutral regulation of speech whenever it has an interest in deterring conduct involved in producing the expression. The principle itself, in addition to explaining Ferber, may explain such disparate outcomes as the ability of a court to enjoin the publication of stolen trade secrets and to award damages for the unapproved publication of copyrighted material. n58 But some hypothetical applications of the principle suggest the need for a boundary line. For example, could the government prohibit all speech whose manufacture involved violations of the Fair Labor Standards Act? Surely such a statute would violate the Constitution. Or, to use another sort of case, could the government prohibit the distribution of all national security information stolen from government agencies? An affirmative answer would require overruling the Pentagon Papers case. n59 The question arises, [*892] then, how to separate permissible from impermissible applications of the principle. I am not sure that any factor, or even set of factors, can serve to explain fully all the cases mentioned. Some relevant considerations, however, might include the value of the speech at issue, the magnitude of the harm involved in producing the speech, the extent to which prohibiting the speech is necessary to prevent the harm from occurring, and the extent to which the expression itself reinforces or deepens the initial injury. n60 With respect to all of these considerations, the prohibition of materials whose manufacture involves sexual violence seems similar enough to the ban in Ferber to suggest that the regulation, while deterring the worst forms of pornography, still would satisfy First Amendment standards. n61

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n58 See Harper & Row, Publishers, Inc. v Nation Enterprises, 471 US 539 (1985).

n59 See New York Times Co. v United States, 403 US 713 (1971). I thank Geof Stone for suggesting this example.

n60 The Ferber Court viewed the harm involved in manufacturing child pornography as great and the value of the resulting expression as usually, though not always, slight. See 458 US at 757-58, 762-63, 773-74. With respect to the necessity of prohibiting not merely the unlawful conduct, but also the speech itself, the Ferber Court stated that "the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled." Id at 759.

Finally, the Ferber Court noted that "the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation." Id.

n61 The Supreme Court's decision in City of Renton v Playtime Theatres, 475 US 41 (1986), might be taken to suggest--although, I believe, wrongly--a further extension of the argument: that the government may prohibit the distribution of materials even substantially correlated to unlawful conduct in manufacture, so long as the definition of these materials is viewpoint-neutral. In Renton, the Court upheld the regulation of adult motion picture theaters on the ground that such theaters generally correlate with a rise in crime in the surrounding neighborhood. Id at 50. The Court declined to require a showing that any particular movie theater in fact produced these results. Similarly, a statute regulating a category of speech that is highly correlated with coercion of, or violence against, women might be thought to pass constitutional muster even if a particular instance of that speech did not involve coercion or violence. This line of argument, however, takes what I believe itself to be a problematic decision much too far. Crucial to the Renton holding was the limited scope of the regulation under review: it zoned adult theaters, but did not prohibit them. Id at 53. A total ban on speech, based on a mere correlation between the speech and unlawful conduct (even if the conduct, as in Renton and here, stemmed from something other than the speech's communicative effects), would raise constitutional concerns of much greater magnitude.

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C. Obscenity

The government can also regulate sexually graphic materials harmful to women by using the long-established category of obscenity. This approach to regulating such materials has come to assume the aspect of heresy in the ranks of anti-pornography feminism. Those who have argued for regulating pornography have stressed the differences, in rationale and coverage, between bans [*893] on the pornographic and bans on the obscene. It is said that obscenity law focuses on morality, while pornography regulation focuses on power. n62 It is said that offensiveness and prurience (two of the requirements for finding a work obscene) bear no relation to sexual exploitation. n63 It is said that taking a work "as a whole," as obscenity law requires, and exempting works of "serious value," as obscenity law does, ill-comports with the goal of preventing harm to women. n64 I do not think any of this is flatly wrong, but I do wonder whether these asserted points of difference--today, even if not in the past--suggest either the necessity or the desirability of spurning the obscenity category.

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n62 See MacKinnon, Feminism Unmodified at 147 (cited in note 13).

n63 See id at 174-75; Sunstein, 92 Colum L Rev at 20-21 (cited in note 45).

n64 See MacKinnon, Feminism Unmodified at 174-75 (cited in note 13).

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My doubts began in the midst of first teaching a course on free expression. In keeping with the prevailing view, I rigidly segregated the topics of

obscenity and pornography. (If I recall correctly, I taught commercial speech in between the two.) In discussing each, I iterated and reiterated the distinctions between them, in much the terms I have just described. I think I made the points clearly enough, but my students resisted; indeed, they could hardly talk about the one topic separately from the other. In discussing obscenity, they returned repeatedly to the exploitation of women; in discussing pornography, of course, they dwelt on the same. Those who favored regulation of pornography also favored regulation of obscenity--at least as a second-best alternative. Those who disapproved regulation of pornography also disapproved regulation of obscenity. Perhaps it was a dense class or I a bad teacher, but I think not; rather, I think the class understood--or, at the very least, unwittingly revealed--something important.

Even when initially formulated, the current standard for identifying obscenity was justified in part by reference to real-world harms. To be sure, the Supreme Court, in its fullest statement of the rationale for establishing the category of obscenity, spoke of the need "to protect "the social interest in . . . morality' " and, what is perhaps the same thing, of the need " "to maintain a decent society . . . .' " n65 Here, the Court appeared to stress a version of morality divorced from tangible social consequences and related to simple sentiments of offense or disgust. But the Court also spoke [*894] of--indeed, emphasized just as strongly--the "correlation between obscene material and crime" and, in particular, the correlation between obscene materials and "sex crimes." n66 This concern too may reflect a notion of morality, but if so, it is a morality rooted in material harms. n67 And although some of the specific harms then perceived might now appear dated--the Court was thinking as much of unlawful acts involving "deviance" as of unlawful acts involving violence--still the Court understood the obscenity category as emerging not merely from a body of free-floating values, but from a set of tangible harms, perhaps including sexual violence. n68

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n65 Paris Adult Theatre I v Slaton, 413 US 49, 59-60, 61 (1973) (emphasis deleted), quoting Jacobellis v Ohio, 378 US 184, 199 (1964) (Warren dissenting), and Roth v United States, 354 US 476, 485 (1957).

n66 413 US at 58-59.

n67 See Daniel O. Conkle, Harm, Morality, and Feminist Religion: Canada's New--But Not So New--Approach to Obscenity, 10 Const Comm 105, 123-24 (1993), for discussion of these two kinds of morality (offense-based and harm-based) as reflected in obscenity doctrine.

n68 For this reason, I think Catharine MacKinnon's statement that obscenity is "ideational and abstract," rather than "concrete and substantive," represents something of an overstatement, even as applied to the initial understanding and formulation of the category. See MacKinnon, Feminism Unmodified at 175 (cited in note 13).

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Much more important is the way conceptions of obscenity have evolved since then, in part because of the anti-pornography movement itself, in part because of the deeper changes that movement reflects in public attitudes and morals.

This shift in understanding, I think, accounted for my classroom experience. It is hard to test a proposition of this sort, but I will hazard it anyway: one of the great (if paradoxical) achievements of the anti-pornography movement has been to alter views on obscenity--to transform obscenity into a category of speech understood as intimately related, in part if not in whole, to harms against women. n69 Surely, such a change in perception should come as no great surprise. It would be the more astonishing by far if obscenity were viewed today as obscenity was viewed two decades ago, when the current constitutional standard was first announced. A doctrinal test does not so easily freeze public understandings, especially when the test in part relies (as the obscenity test does) on community standards and consciousness. n70 Views of obscenity, in other words, are not [*895] static, and they may have evolved in such a way as to link obscenity with harms to women.

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n69 One interesting proof (and product) of this reconceptualization is Senator Mitch McConnell's proposed legislation granting the victim of a sexual offense a right to claim damages from the distributor of any obscene work deemed to have contributed to the crime. Pornography Victims' Compensation Act of 1991, S 1521, 102d Cong, 1st Sess (Jul 22, 1991). Whatever the merits of this legislation, which raises serious concerns on numerous grounds, it clearly presupposes a link between obscenity and sexual violence.

n70 The obscenity standard asks whether the average person, applying contemporary community standards, would find a work prurient and offensive in its depiction of sexual conduct. It also asks whether the work lacks serious literary, artistic, political, or scientific value. See Miller v California, 413 US 15, 24 (1973).

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Now it might be argued, in response to this claim, that so long as the formal test for determining obscenity remains the same, this reconceptualization of obscenity will avail women little, because the test's focus on prurience and offensiveness will prevent new understandings from affecting judicial outcomes. But this response seems to ignore the subtle and gradual ways law often develops. As prosecutors, juries, and judges increasingly adopt this new view of obscenity, enforcement practices and judicial verdicts naturally will come to resemble, although not to replicate, those that would obtain under an anti-pornography statute. There is in fact a substantial overlap between the categories of obscenity and pornography: most of the worst of pornography (materials with explicit and brutal sexual violence) meets the obscenity standard. As public perceptions continue to change, the application of the obscenity standard increasingly will focus on the materials causing greatest harm to women; nor need this development reflect any illegitimate acts of prosecutorial discretion. n71

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n71 If prosecutors determine to enforce obscenity laws only against materials with a certain viewpoint, the resulting actions would be no less problematic than the MacKinnonDworkin statute itself. But this result is hardly the only one that could be produced by changing public norms. For example, as noted earlier and discussed again below, a focus on sexual violence arguably is not

viewpoint-biased. See text accompanying notes 52-54 and 74. Thus, to the extent that prosecutors enforce obscenity laws strictly against sexually violent materials that fall within the obscenity category, their acts would not violate the R.A.V. proscription of preferring some viewpoints to others within a low-value category.

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Moreover, this new focus may over time reshape, in a desirable manner, even the governing legal standard for determining obscenity. Doctrinal adjustments and reformulations of existing low-value categories of speech may well--and should--occur more readily than the creation of whole new categories, especially when the proposed new categories incorporate clear viewpoint bias. So, for example, the current obscenity test's requirement that materials be patently offensive may disintegrate in light of new understandings about the harms the obscenity category principally should address. This evolution of obscenity law recently has occurred in Canada, where the Supreme Court, responding to increased evidence and altered perceptions of harm to women, made sexual violence rather than sexual offensiveness the keystone of the obscenity category. n72 Efforts to redefine the obscenity category in this manner--a redefi [*896] nition that, consistent with much First Amendment theory, would tend to divorce speech restrictions from simple feelings of offense--should proceed in the United States as well. n73

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n72 See Regina v Butler and McCord, 1992 1 SCR 452, 134 NR 81, 108-18 (Canada).

n73 It might be argued that such a redefinition of the obscenity category would render it viewpoint-based and therefore inconsistent with the First Amendment. This argument depends first on the proposition that a statute framed in terms of sexual violence is viewpointbased, which I have discussed in the text accompanying notes 52-54. As important, the argument depends on the proposition that the obscenity category is not now viewpointbased--in other words, that it does not now constitute some kind of exception to the rule of viewpoint neutrality. This proposition is difficult to maintain given the obscenity test's reliance on community standards of offensiveness. See Sunstein, 92 Colum L Rev at 28-29 (cited in note 45). As between an obscenity doctrine that focuses on sexual prurience and offensiveness and an obscenity doctrine that focuses on sexual prurience and violence, the former would appear to pose the greater danger of viewpoint bias.

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One measure along these lines that states or localities might attempt involves the special regulation of subcategories of obscenity that contain sexual violence. R.A.V. might seem to bar such an approach; it held, after all, that even within low-value categories of speech, such as obscenity or fighting words, the government may not make distinctions that pose a danger of viewpoint bias. I have argued above that a statute framed in terms of sexual violence may no more implicate this principle than the several statutes upheld by the Court framed in terms of sexual explicitness. n74 But even if courts reject this argument, another possibility presents itself. The Court in R.A.V. stated as an exception to its broad rule that a subcategory of unprotected speech can be

specially regulated if it presents, in especially acute form, the concerns justifying the exclusion of the whole category from First Amendment protection. n75 It is hard to know what this exception means, especially in light of the Court's refusal to apply it to the category of race-based fighting words, which appears to pose in especially acute form the dangers giving rise to the entire fighting words category. It is no less difficult to determine what the exception should mean, given the ability to characterize in many different (and even conflicting) ways the concerns underlying any low-value category and the ease of restating those concerns with respect to any given subcategory. But given the Court's acknowledgment of the relationship between sexual crimes and obscenity, some consideration should be given to whether a statute focusing on the particular kinds of obscenity that most contribute to sexual violence would or should fall within the R.A.V. exception. n76 [*897]

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n74 See text accompanying notes 52-54 and notes 71 and 73.

n75 112 S Ct at 2545-46.

n76 The Court wrote, for example, that "a State may choose to regulate price advertising in one industry but not in others, because the risk of fraud (one of the characteristics of commercial speech that justifies depriving it of full First Amendment protection) . . . is in its view greater there." Id at 2546. So too, it might be said, a State may choose to regulate in a special manner sexually violent obscenity because it poses a greater risk of contributing to sexual crimes--one of the characteristics of obscenity that justifies depriving it of full First Amendment protection.

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The key point here is that regulation of obscenity may accomplish some, although not all, of the goals of the anti-pornography movement; and partly because of the long-established nature of the category, such regulation may give rise to fewer concerns of compromising First Amendment principles. Even for those who think that the obscenity doctrine is in some sense a second-best alternative, it represents the first-best hope of achieving certain objectives. And the obscenity doctrine itself may benefit by transformative efforts, as these efforts bring the doctrine into greater accord with the harm-based morality of today, rather than of twenty years ago.

D. Exceptions to Viewpoint Neutrality

The final approach I will discuss, although far more briefly than it deserves, involves crafting arguments to support explicit exceptions to the rule against viewpoint discrimination for pornography or hate speech. As noted earlier, exceptions to this rule do exist, but without any clear rationale; the Court, in upholding viewpoint discriminatory actions, simply has ignored their discriminatory nature. We know, from the decision in R.A.V. and the affirmance of Hudnut, that the Court will follow no such course of studied inattention with respect to pornography or hate speech: in both cases, the presence of viewpoint discrimination was considered--and was declared dispositive. The question, then, arises: Is it possible to make a convincing argument to the contrary? Is it possible, that is, to accept viewpoint neutrality as a general principle, but to support an exception to that principle either for pornography or for hate

speech? The challenge here is to explain in credible fashion what makes one or two or three viewpoints (or one or two or three instances of viewpoint discrimination) different from all others--sufficiently different to support an exception and sufficiently different to ensure that the exception retains "exceptional" status. I cannot here provide the answer to that question. Instead, I will confine myself to some general observations about what considerations might be relevant to the inquiry.

Two factors necessary (but, I will argue, generally insufficient) for departing from the norm of viewpoint neutrality are (1) the [*898] seriousness of the harm the speech causes, and (2) the "fit" between the harm and the viewpoint discriminatory mechanism chosen to address it. The first consideration has an obvious basis: to the extent a viewpoint causes insignificant harm, the state's decision to suppress that viewpoint must rest not on legitimate reasons but on mere dislike of the idea at issue. The second consideration is related and not much more mysterious: when the government restricts a viewpoint, but the viewpoint is not coextensive with the harm allegedly justifying the governmental action, we may wonder (once again) whether the action is in fact motivated by simple distaste for the message. I have no doubt that a regulation of pornography and hate speech would satisfy the first inquiry, and little doubt that such a regulation could be carefully enough constructed to satisfy the second. Is that, however, sufficient?

I think not. Assume, for example, a carefully crafted regulation of abortion advocacy, counseling, or referral (the category of speech involved in Rust v Sullivan n77 ), designed to reduce the incidence of abortions. Proponents of the regulation might urge that the law is precisely crafted to reduce the significant harms stemming from abortion; hence the law satisfies the two inquiries set forth above. I presume this outcome would strike many as irretrievably wrong. But, some opponents of the regulation might contend, the example fails to prove my larger point because the "harms" in the hypothetical case (however serious some might find them) are in fact widely contested and for that reason cannot form the basis of viewpoint regulation. These opponents might contrast a precisely crafted regulation of pro-smoking speech, designed to reduce the frequency of tobacco use. In that case, the harms are not contested; hence the regulation can go forward. The contrast here has much intuitive appeal, and I am not at all sure it has nothing to teach us. But this general line of reasoning makes the protections of the First Amendment weakest at the very point where views are the most unorthodox and unconventional. And even if I am wrong to think this result upside-down and unacceptable, another question would follow: Are not the harms caused by pornography and hate speech--characterized most generally as racial and sexual subordination--also very much contested? If they were not, the debate over hate speech and pornography might not have reached so intense a level. [*899]

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n77 111 S Ct 1759, 1765 (1991).

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Assuming, then, that harm and "fit" cannot alone justify viewpoint discrimination, perhaps the addition of low-value speech can do so. In other words, if legislators can make the case that speech leads to harm, if the speech regulated correlates precisely with that harm, and if the speech is itself

low-value, then any viewpoint discrimination involved in the regulation becomes irrelevant. n78 At first glance, of course, R.A.V. definitively rejected this argument: the very holding of that case was that even within a low-value category of speech, viewpoint discrimination is generally prohibited. So, to use one of the Court's hypotheticals, the government may proscribe libel, but may not proscribe only libel attacking the government; or, to use something near the actual case, the government may prohibit fighting words, but may not prohibit only racist fighting words. n79 But what, then, are we to make of a category like obscenity--an entire low-value category (rather than a subdivision thereof) that seems to incorporate some viewpoint bias? n80 Could it possibly be the case that viewpoint discrimination built into the very definition of a low-value category is permissible, whereas viewpoint discrimination carving up a neutrally defined low-value category is not?

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n78 I take Cass Sunstein to be making something like this argument in these pages. See 60 U Chi L Rev at 829 (cited in note 17).

n79 112 S Ct at 2543 & n 4. The actual ordinance, as construed, prohibited race-based fighting words (discriminating by subject matter), but the Court argued that this restriction operated in practice in the same way as an ordinance banning racist fighting words (discriminating by viewpoint). See id at 2547-48.

n80 See notes 13 and 73.

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The proposition is perhaps less silly than it appears, for the latter, but not the former, lacks the precise "fit" that I above termed necessary for viewpoint regulation. When the Court establishes a low-value category, such as obscenity, it determines that the harms caused by the covered speech so outweigh its (minuscule) value that regulation of the speech, even if viewpoint discriminatory, will be permitted. The Court, in effect, predecides that regulation of the entire category will arise not from governmental hostility to the ideas restricted, but rather from a neutral decision based on harms and value; the viewpoint bias will occur as a mere byproduct of the fact that only the restricted ideas cause great harms and have sparse value. This predetermination insulates the government from a charge of viewpoint bias when the government regulates the entire category. But the establishment of a low-value category has no such effect when the government regulates within the category on the basis of a viewpoint extraneous to the cate [*900] gory's boundaries. In that case, there is reason to suspect that the government is acting not for the reasons already found by the Court to be legitimate, but rather out of hostility to a message. The critical failure in such a regulation relates to "fit": because the regulation is underinclusive--because it does not regulate all speech previously determined to cause great harm and have no value--the concern arises that the government has an illegitimate motive. Hence, to say, as the Court did in R.A.V., that the government may not engage in unrelated viewpoint discrimination within a low-value category--may not, for example, ban only obscenity produced by Democrats--is not to say that viewpoint may not enter into the very definition of a low-value category. Once again, in the latter case viewpoint serves as a placeholder for a balance of harms and values found legitimate by the Court; in the former case, viewpoint serves as

a warning signal that the government is acting for other reasons.

But even if this distinction holds, the hard question remains: should the Court accept pornography or hate speech as a low-value category of expression? The currently recognized categories of lowvalue speech seem to share the trait, as Cass Sunstein writes, that they are neither "intended nor received as a contribution to social deliberation about some issue." n81 That definition offers several lessons for any regulation, concededly based on viewpoint, either of hate speech or of pornography. In the case of hate speech, such an ordinance should be limited to racist epithets and other harassment: speech that may not count as "speech" because it does not contribute to deliberation and discussion. In the case of pornography, any ordinance should be limited to materials that operate primarily (as obscene materials operate primarily) as masturbatory devices; in addition, an explicit exception, like that in the obscenity standard, for works of serious value ought to be incorporated. Only if pornography and hate speech are defined in this narrow manner might (or should) the Court accept them as low-value categories--a classification that, it must be remembered, depends at least as much on the non-expressive quality of the speech as on the degree of harm the speech causes.

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n81 Sunstein, 60 U Chi L Rev at 807.

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In addition to all this, perhaps one other factor--the modesty, or limited nature, of the viewpoint restriction--should be considered prior to recognizing a low-value category of speech incorporating viewpoint bias. This inquiry would focus on whether the regu [*901] lation of the category wholly excises the viewpoint from the realm of public discourse or cuts off only a limited means of expressing the viewpoint. n82 Even the MacKinnon-Dworkin version of anti-pornography legislation would do only the latter: it would prohibit not all messages of sexual subordination, but only those messages expressed in a sexually graphic manner. This feature seems critical to the establishment of any exception to the viewpoint neutrality principle. The broader the restriction, the more it will skew public discourse toward some views and away from others. And the larger the skewing effect, the greater the chances of improper governmental motivation; a wholesale, more than a marginal, restraint suggests a government acting not for neutral reasons, but out of simple hostility to the idea restricted. Of course, the inquiry into the scope of a viewpoint restriction does not lend itself to scientific precision. The matter is always one of degree, involving the drawing of a line someplace on a spectrum. The inquiry, too, is complicated by the issue whether the particular means restricted (even if technically modest) constitute the most effective way of delivering the message, such that the restriction ought to be treated as sweeping. But the haziness of the endeavor does not gainsay the need to engage in it. For a viewpoint restriction that results in excising ideas from public discourse ordinarily ought not to be countenanced--even when the restriction applies only to lowvalue speech and even when the restriction closely responds to serious harms.

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n82 I do not at all advocate here that courts consider the modesty of a viewpoint restriction in all cases involving viewpoint regulation. Rather, I mean that courts should ask this question when the other criteria, discussed above, for departing from the viewpoint neutrality rule have been met. This approach is similar to the one used in City of Renton v Playtime Theatres, Inc., 475 US 41, 53 (1986), in which the Supreme Court looked to the scope of the speech restriction at issue--an inquiry the Court normally eschews--in a case involving low-value speech. For a detailed discussion generally disapproving any inquiry into the modesty of a viewpoint restriction, although not considering the precise issue raised here, see Stone, Content Regulation and the First Amendment at 200-33 (cited in note 26).

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CONCLUSION

The presumption against viewpoint discrimination, relied upon in Hudnut and further strengthened in R.A.V., has come to serve as the very keystone of First Amendment jurisprudence. This presumption, in my view, has real worth, in protecting against improperly motivated governmental action and against distorting effects on public discourse. And even if I assign it too great a value, the principle still will have to be taken into account by those who [*902] favor any regulation either of hate speech or of pornography. I have suggested in this Essay that the regulatory efforts that will achieve the most, given settled law, will be the efforts that may appear, at first glance, to promise the least. They will be directed at conduct, rather than speech. They will be efforts using viewpoint-neutral classifications. They will be efforts taking advantage of the long-established unprotected category of obscenity. Such efforts will not eradicate all pornography or all hate speech from our society, but they can achieve much worth achieving. They, and other new solutions, ought to be debated and tested in a continuing and multi-faceted effort to enhance the rights of minorities and women, while also respecting core principles of the First Amendment.

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# EXCHANGE; PROPERTY AND THE POLITICS OF DISTRUST: Property, Speech, and the Politics of Distrust.

Richard A. Epstein +

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+ James Parker Hall Distinguished Service Professor of Law, The University of Chicago. This Article was prepared for The Bill of Rights in the Welfare State: A Bicentennial Symposium, held at The University of Chicago Law School on October 25-26, 1991, in a debate with Professor Frank I. Michelman of Harvard University, to whose work on eminent domain I continue to be heavily indebted. I should like to thank Elena Kagan, Lawrence L. Lessig, Michael W. McConnell, Daniel Shapiro, and Geoffrey R. Stone for their valuable comments on an earlier draft of this Article. I have also benefitted from the comments I received when I presented versions of this paper at a faculty seminar at the Institute of Humanities at Dartmouth College, and at a lecture at the Vermont Law School in November, 1991.

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SUMMARY:
... I. PROPERTY AND SPEECH: CONSTITUTIONAL OPPOSITES OR CONSTITUTIONAL TWINS? ... The Free Speech Clause does not contain a Just Compensation Clause ("Congress may abridge freedom of speech for public use, with just compensation"), and it is possible to protect freedom of speech without at all confronting what is critical about economic affairs in the welfare state: the redistribution of wealth on the basis of need. ... Distrust and the Free Speech Clause. ... Freedom of speech allows factions to organize and mobilize in order to obtain wealth transfers through taxation or regulation; thus freedom of speech only reduces overall social wealth and security. ... The nondiscrimination test requires that the restriction be imposed upon activities both unrelated and related to speech. ... The current constitutional equilibrium on subversive speech, reached in Brandenburg v Ohio, is consistent with the general libertarian approach: ...

TEXT:

[*41] I. PROPERTY AND SPEECH: CONSTITUTIONAL OPPOSITES OR CONSTITUTIONAL TWINS?

My task in this article is not an enviable one: It is to persuade you that the dominant mode of thinking about property rights during the past fifty years has been a mistake of constitutional dimensions. It would be convenient if I could say that I merely favor a return to the set of doctrines that governed

economic liberty and property before 1937, in the so-called Lochner era. n1 Yet that description would understate the difference between my views [*42] and the historical evolution of the law. Some of the most restrictive decisions on property rights took place in the years before 1937, often by judges who would be described as conservative by modern standards. I refer here by way of example to the lamentable decisions of Justice Holmes in Block v Hirsh, n2 and of Justice Sutherland in Euclid v Ambler Realty Co. n3 The first of these upheld the power of the state to impose rent control restrictions, "temporarily" of course; n4 and the second gave the state expansive powers to control land use through zoning, n5 a power that has hardly been enlarged in the ensuing sixty years of ceaseless litigation.

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-@Tn1The era is, of course, named after Lochner v New York, 198 US 45 (1905). For a leading attack on the case, see Cass R. Sunstein, Lochner's Legacy, 87 Colum L Rev 873 (1987). In truth, before 1937, courts routinely upheld economic regulations that deviated dramatically from common law principles, of which rent control statutes are only the most conspicuous examples. See New York Central R.R. Co. v White, 243 US 188 (1917) (upholding the constitutionality of New York's workmen's compensation act). For a discussion of the manifest inconsistencies in those decisions supposedly protective of economic liberties, see Richard A. Epstein, The Mistakes of 1937, 11 Geo Mason U L Rev 5, 13-20 (Winter 1988).

n2 256 US 135 (1921). I have criticized Holmes's Block opinion in Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain 176-77 (Harvard, 1985) ("Takings"); and in Richard A. Epstein, Rent Control and the Theory of Efficient Regulation, 54 Brooklyn L. Rev 741, 748-50 (1988).

n3 272 US 365 (1926). I have also criticized Sutherland's Euclid opinion in Epstein, Takings at 131-34 (cited in note 2).

n4 Block, 256 US at 154.

n5 Euclid, 272 US at 388-90.

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I am therefore urging not a return to some lost golden era, but the adoption of a regime for the protection of private property and economic liberties that is far more extensive and internally coherent than the patchwork of potections afforded to these interests under the Takings Clause before 1937. More difficult still, I believe that all this transformation is possible even with the universal acceptance of the "welfare state" -- the commitment to support people in need by casting that burden on others through the coercive mechanism of the state -- which has become a permanent part of the basic constitutional order at both the state and federal level. My task is made more complicated in that the defense of the present constitutional scheme is undertaken by Professor Frank Michelman, who surely ranks among the most eloquent expositors of the Just Compensation Clause, and as one of the most ardent defenders of the modern legal order that I seek to undermine. n6

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n6 See Frank I. Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv L Rev 1165 (1967), an acknowledged classic in the area.

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In order to develop my case, I shall pursue the analysis from an unconventional quarter: I shall look at the doctrinal structures of First Amendment law and then indicate how they can, and should, be carried over into the analysis and discussion of the Takings Clause. My basic conclusion is that the Takings Clause and economic liberties should not be viewed as things alien and uncongenial to modern constitutional norms. One need only apply to private [*43] property the presuppositions and techniques that have organized the law of freedom of speech. Within this framework the sole concession that one must make to the welfare state is to accept income redistribution funded with taxes (perhaps even progressive taxes) derived from general revenue sources. Otherwise, the edifice to protect freedom of speech carries over to private property, without losing a beat.

In comparing amendments, there is a genuine question as to which body of First Amendment law one should consult. The obvious point of departure is the body of case law developed by the United States Supreme Court. That is, of course, an incredibly complicated body of law, with many nuances that are not necessarily relevant to the present discussion. n7 More critically to this enterprise, it may well contain certain serious mistakes of both under- and over-protection of speech that can embarrass any general theory.

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n7 For one recent account, see Geoffrey R. Stone, et al, Constitutional Law 1011-454 (Little Brown, 2d ed 1991).

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Some of the free speech decisions are simply wrong in principle. For example, New York Times Co. v Sullivan n8 protects speech more than a comprehensive theory of speech requires. n9 In the opposite direction, of course, a consistent theory also requires more extensive protection of speech than the Court now provides. n10

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n8 376 US 254 (1964).

n9 See Richard A. Epstein, Was New York Times v. Sullivan Wrong?, 53 U Chi L Rev 782 (1986). See also text accompanying notes 66-70.

n10 See text accompanying notes 93-95.

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Other free speech decisions, though sound in principle, incorrectly apply the principle to the case at hand. One conspicuous illustration is perhaps United States v O'Brien, n11 where the Supreme Court upheld the conviction of the defendant for burning his draft card, in violation of a content-neutral

statute that forbade the willful destruction of draft cards for any purpose. n12 The Court announced that it followed a test of compelling state interest, which I regard as sound law. n13 But the Court then so watered down its application as to allow the weakest forms of administrative [*44] convenience--communication with draftees, reminders of civic obligations--to count as compelling state interests. n14

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n11 391 US 367 (1968).

n12 Id at 382.

n13 The relevant portion of the opinion reads:

To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. Id at 376-77 (footnotes omitted).

n14 Id at 378-90.

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A similar debasement of the compelling state interest test is apparent in Austin v Michigan State Chamber of Commerce. n15 There the Court found a compelling state interest that allowed Michigan to prohibit corporations from making independent expenditures to support or oppose candidates for state elective office. The Court's inquiry on the question of state justification was, however, wholly disingenuous, for the Court contented itself with unsupported assertions that corporate contributions were "corrosive and distorting" of the overall level of political debates. n16 But there was no effort to offer any account of those rough and tumble political debates which were uncorrupted and undistorted. Nor was there the slightest recognition that different corporations might weigh in on different sides of election campaigns, or that political expenditures by corporations might be especially valuable precisely because corporation (and their out-of-state shareholders) could not vote in elections whose outcome is of major importance to them. It is difficult to see how any selective restriction on the parties entitled to engage in political speech should survive a First Amendment challenge.

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n15 494 US 652 (1990). For trenchant criticism, see Jill E. Fisch, Frankenstein's Monster Hits the Campaign Trail: An Approach to Regulation of Corporate Political Expenditures, 32 Wm & Mary L Rev 587 (1991).

n16 Austin, 494 US at 660.

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I regard it, however, as mistaken to allow the covert dilutions of the compelling state interest test in either O'Brien or Austin to organize any comparison between First and Fifth Amendment law. Even after these decisions, it is possible to make sensible internal adjustments and reevaluations of First Amendment law to facilitate the appropriate comparisons. n17 Basically, the "corrections" that one must make to speech law for the analysis to be good must satisfy two conditions: First, they cannot be so numerous that they completely revise First Amendment law, and second, they must accord with the doctrine's accepted animating principles.

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n17 For an example of such reevaluation of O'Brien, see Dean Alfange, Jr., Free Speech and Symbolic Conduct: The Draft-Card Burning Case, 1968 S Ct Rev 1, 23-27, 42-46.

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Finally, there is a third limitation with respect to the kinds of issues that I consider. Generally stated, both the First and Fifth [*45] Amendments can apply to two distinct types of situations. In the first, the government seeks to regulate the private activities of individuals on their own property. n18 The activity could be a political meeting, or the construction of a new home. In the second, the government seeks to regulate activities on public property. n19 Thus the issue is how the government can allocate "its" own resources through contract or through grant. Typically the issue is what conditions the government may attach to its permission to use public space or to receive public funding. Sometimes the question is whether the government can condition a tax benefit upon the performance of some particular act or the making of some particular statement. n20 These latter issues are of increasing importance in modern times, and in many cases where the government acts as a contracting party, I think that the law is less protective of both speech and property than it should be. n21 Nonetheless the exclusive focus in this Article shall be on the role of government as regulator, not as contracting party, funding agent, or property owner.

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n18 See, for example, Nollan v California Coastal Commission, 483 US 825 (1987) (Commission granted a permit allowing construction of a larger house on beachfront property on the condition that the property owners grant the public an easement across their private beach).

n19 See, for example, Lovell v City of Griffin, 303 US 444 (1938) (permit required to distribute circulars within the city limits); Red Lion Broadcasting Co. v FCC, 395 US 367 (1969) (FCC requirement that each side of a public issue be presented on broadcast stations; the "fairness doctrine").

n20 See, for example, Speiser v Randall, 357 US 513 (1958) (veteran's tax exemption conditioned on filing of an oath that taxpayer did not advocate overthrow of the United States or California governments, nor advocate support of a hostile government during wartime).

n21 For a statement of my views, see Richard A. Epstein, Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent, 102 Harv L Rev 4 (1988).

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With these caveats in mind, it is critical to understand the basic attitude that courts take toward the legislative and executive branches of government. Whatever the virtues of stirring rhetoric, it is clear that the First Amendment cannot prohibit all regulation of speech by all government at all levels. Freedom of speech is not the same as an uninhibited license to speak -- to lie, to deceive, to molest, to coerce. So the fundamental postulate of distrust of government does not translate into a total ban against all government regulation of all forms of speech, but into a strong presumption that can be overridden only by establishing some compelling government interest, as the language used in O'Brien and Austin itself indicated. The key questions therefore under the First Amendment -- and they are also the key questions under the Fifth [*46] Amendment -- are the following: First, what is the scope of the initial protection afforded by the presumption in favor of free speech? Second, how can that protection be overridden?

This inquiry, even within a strict interpretative framework, is necessarily vast. No analysis of what is meant by speech alone will determine the contours of freedom of speech. Instead it is necessary to detail the operations of a system of freedom, a vast undertaking that reluctant judges undertake only because they labor under the strict compulsion to decide cases. But scholars can and must be more relentless and systematic in their pursuits. The basic outlines of a system of freedom of speech must be delineated and defended. But the size of the payoff is commensurate with the difficulty of the undertaking. If we understand how this body of law works, then we will have a good road map for understanding the Takings Clause.

There are, of course, important differences between the Free Speech and Takings Clauses. The Free Speech Clause does not contain a Just Compensation Clause ("Congress may abridge freedom of speech for public use, with just compensation"), n22 and it is possible to protect freedom of speech without at all confronting what is critical about economic affairs in the welfare state: the redistribution of wealth on the basis of need. But before distinguishing property from speech, it is important to see what general view links them together. The modern insistence that speech is a fundamental liberty, while property is the creature of legislation and subject to its whims, does much to distort the proper relationship between the two sets of constitutional limitations. The Free Speech and Takings Clauses should be understood as working in harmony with each other, not in opposition. It is important therefore never to forget the essentially libertarian cast to both clauses: strong, decentralized private rights and a central government with limited powers, any exercise of which must be justified.

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n22 Compare US Const, Amend I ("Congress shall make no law . . . abridging the freedom of speech . . . ."), with US Const, Amend V ("[N]or shall private property be taken for public use without just compensation.").

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In this Article I shall outline the basic linkage between these two clauses in order to demonstrate that what has proved sound policy for speech should pay handsome social dividends for property and economic affairs as well. Indeed, there is good reason to believe that free speech will produce more net social benefit in a world in which property rights are more carefully protected than under the present state of affairs, where there is essentially no constitutional [*47] protection of property and contract against prospective legislation, or, it now appears, against retroactive legislation as well. n23 In order to make this case, I shall explicate the dominant tendencies of First Amendment law through the eyes of a cautious libertarian, and then show how the parallel issues for property are usually resolved in a very different fashion.

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n23 See, for example, Usery v Turner-Elkhorn Mining Co., 428 US 1 (1976) (constitutionality of retroactive taxes to fund black lung disease compensation plans).

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The plan of action is therefore as follows. In Section II, I argue that the constitutional defenses of property and speech rest on the sense that government is a necessary evil. Government is necessary to preserve civil order, but its officials should not be viewed as saviors; they are self-interested persons with imperfect knowledge subject to a universal presumption of distrust.

In Section III, I identify the extensive set of issues common to freedom of speech and to the protection of private property. I show how the postulate of distrust organizes First Amendment doctrine, and how its absence explains the flaccid and unprincipled structure of the law protecting private property and economic liberties. The points of parallelism are made evident by the logical structure of the two clauses. Both clauses set initial presumptions, and not final absolutes. In both areas, therefore, the complete inquiry requires at least five stages: (1) identifying the protected private interest; (2) identifying the state actions that violate that interest; (3) justifying those state actions, if possible; (4) timing the remedy to protect the private interest; and (5) determining whether to force an exchange to curtail that interest.

Finally, in Section IV, I explain how the logical structure of the First Amendment can be carried over to deal with economic liberties, even granting the unassailable first premise of the welfare state -- some form of income and wealth distribution in favor of the poor.

## II. THE LOGIC OF DISTRUST

It is perhaps useful to begin with a point that can be lost in the more abstract discussion of constitutional theory that follows. There is, of course, both a Free Speech Clause and a Takings Clause (one that contains explicit reference to "private property"), and the extensive interpretive enterprise that follows is an effort to make sense of the two texts in the wide range of situations to which they apply. To begin, however, I do not want to concentrate [*48] on specific textual difficulties, but on a second aspect of

constitutional interpretation of equal dignity with the first: the basic attitudes toward government that are brought to the interpretation of a particular text. Under the First Amendment that attitude clearly is, or has to be, an attitude of distrust. n24

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n24 See, for example, Vincent Blasi, The Checking Value in First Amendment Theory, 1977 Am Bar Found Res J 521. In particular, Blasi notes:

One basic value seems highly relevant to these newer claims [for First Amendment protection], yet has not been accorded a central place in our articulated theory of the First Amendment. This is the value that free speech, a free press, and free assembly can serve in checking the abuse of power by public officials.

Id at 527. I will address some of the other values later. It is sufficient to note here that the list of four values announced by Thomas I. Emerson, The System of Freedom of Expression 6-7 (Random House, 1970), does not contain the checking value. See text accompanying note 31.

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I do not have in mind any very narrow or technical meaning of distrust. As a matter of hornbook law, the person who receives a friend's money, which she then converts to her own use, is a person who has abused a trust. By like analogy, the person who receives public money, which she then spends for private purposes, has abused a trust as well. In each case, a person stands in a position whereby she can obtain personal gain at the expense of individuals to whom she owes a duty. In other cases, the idea of distrust has to do with favoritism: benefits are given to A that are denied to B; when their roles are reversed, some other "neutral" principle of decision is employed to make sure that A prevails again, for reasons utterly irrelevant to any public purpose. The postulate of distrust holds that persons with a public interest to protect and a political agenda to advance will be willing--across the board--to sacrifice the former in order to advance the latter.

In putting the concern in this particular fashion, the idea of distrust is a universal solvent that can be brought to bear on any political initiative. Distrust has both ancient lineage and modern application: "Quis custodiet custodies?" ("Who guards the guardians?") is a Latin maxim that has lost none of its vitality in its contemporary setting. By the same token, distrust is not tied to any narrow or partisan political agenda: Democrat or Republican, liberal or conservative, are equally capable of abusing the public trust. The themes of self-dealing, of waste, of corruption, which are obvious corollaries to the concern with distrust, should also resonate across the usual political lines of controversy. The point is not that all statutes and all government actions are worthy of distrust, for some genuine public interest statutes (think of the Statute of [*49] Frauds and the standard statute of limitation) can emerge from the political process. Yet, at the very least, distrust alerts us to the constant temptation facing any public official who is entrusted with extensive power, but who is all too often subject to only limited supervision.

This theme of distrust, suitably qualified, is not only central to political theory; it is also central to any reading of our constitutional heritage.

When Madison wrote that "Enlightened statesmen will not always be at the helm," n25 it was clear that he thought that diversion of public wealth and position for private gain was the central problem that government must face. The force of his remark is only confirmed by looking at the motley collection of public officials holding high office today. Similarly, Madison's discussion of the entire structure of federalism, divided government, and the system of checks and balances at the federal level shows that the theme of distrust has worked itself into the warp and woof of our constitutional structure.

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n25 See Federalist 10 (Madison) in Clinton Rossiter, ed, The Federalist Papers 77, 80 (Mentor, 1961) ("It is in vain to say that enlightened statesmen will be able to adjust these clashing interests and render them all subservient to the public good. Enlightened statesmen will not always be at the helm.").

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The protection of speech (which is limited to protection against actions by Congress), and the protection of property (which, if anything, is more comprehensive n26) should be read in light of these political concerns. All too often the desire of political figures to suppress speech has to be understood as a crude effort to suppress criticism of public actors, which could lead to their deserved political embarrassment, removal from office, or electoral defeat. Thus the social good of free speech is found in the fundamental check it exerts on how government officials behave. n27 Harry Kalven, while no public choice theorist, was right to stress the importance of seditious libel as the central lesson of the First Amendment--the need to fear government misconduct. n28 A complex set of [*50] doctrines for both content regulation and content-neutral regulation has grown up out of this fear of government misconduct. n29 This fear, while strongest for political speech, n30 surely extends to

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n26 Compare US Const, Amend I ("Congress shall make no law . . . abridging the freedom the freedom of speech . . . ."), with US Const, Amend V ("[N]or shall private property be taken for public use with just compensation."). The passive voice of the Fifth Amendment does not expressly limit the Fifth Amendment protection to laws passed by Congress.

n27 See Blasi, 1977 Am Bar Found Res J at 529-38 (cited in note 24), for the antecedents in Locke and Madison.

n28 See Harry Kalven, Jr., The New York Times Case: A Note on "The Central Meaning of the First Amendment", 1964 S Ct Rev 191, 205 ("[A]nalysis of free-speech issues should hereafter begin with the significant issue of seditious libel and defamation of government by its critics rather than with the sterile example of a man falsely yelling fire in a crowded theatre."). Kalven may have been correct about the example, but he was wrong about the tradition. Holmes used the example of crying fire in order to show why the freedom of speech was not an absolute. See Schenck v United States, 249 US 47, 52 (1919). But the early cases testing the limitations on speech were all concerned with seditious activities and national security. Schenck itself involved pamphlets urging resistance to the draft. See id at 50-51.

n29 For exhaustive and sympathetic expositions of the basic positions, see Geoffrey R. Stone, Content Regulation and the First Amendment, 25 Wm & Mary L Rev 189 (1983); Geoffrey R. Stone, Content-Neutral Restrictions, 54 U Chi L Rev 46 (1987).

n30 Compare Cass R. Sunstein, Free Speech Now, 59 U Chi L Rev 255, 262-63, 301 (1992) (First Amendment principally protects political speech).

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A. Distrust: A Single Rationale for Speech and Takings Law

This effort to locate a single concern behind the First Amendment is at variance with the common intellectual practice, which insists that there are many separate "value bases" that lie behind the interpretation of any given constitutional provision. The dominant modes of modern interpretation are far too ecumenical: They try to find a broad collection of values to justify the key constitutional provisions, and then pick that rule which best accommodates those competing values. Thus Professor Emerson's list for free speech, which has achieved the status of conventional wisdom, includes individual self-fulfillment, the pursuit of truth in the marketplace of ideas, participation in public life, and the maintenance of a stable community through interaction and exchange. n31

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n31 Emerson, The System of Freedom of Expression at 6-8 (cited in note 24).

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I am instinctively and deeply suspicious of explanations that rely on a combination of many independent factors to generate the doctrinal structure of any area of law. The objection is formal. Two values can either cut in the same direction or in different directions. If they cut in the same direction, then it is not possible to choose between them. If they cut in different directions, then any outcome can be achieved by assigning the right weight to the preferred value. The uneasiness that many commentators have had with "balancing tests" under the First Amendment is not only because of the practical indeterminacy of such tests, but also because of their theoretical malleability: When no single variable is to be maximized, then any solution is as good as any other. We should have the same suspicion of these loose tests under the Takings [*51] Clause, where the plastic nature of the doctrine is evident upon the slightest inspection. n32

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n32 I pursue this theme in Richard A. Epstein, Not Deference, But Doctrine: The Eminent Domain Clause, 1982 S Ct Rev 351.

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It is important therefore to recognize that there is weakness and not strength in the common effort to find plural bases for speech and takings law. n33 In order to show that such strategies are not appropriate, I make just two assumptions: first, that legislators and executives always have perfect

knowledge, and second, that they always seek to serve the public good. On these assumptions, I argue, even if the First and Fifth Amendments were given the most stringent interpretations imaginable, every statute would be constitutional under the most stringent standards of judicial review. n34

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n33 For the opposite conclusion, as applied to takings, see Stephen R. Munzer, A Theory of Property ch 11 (Cambridge, 1990).

n34 I have developed this argument with respect to the Takings Clause in Richard A. Epstein, The Utilitarian Foundations of Natural Law, 12 Harv J L & Pub Pol 713, 745-47 (1989).

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1. Distrust and the Takings Clause.

To demonstrate, let us begin with the Takings Clause. What kinds of economic legislation should we expect the legislature to pass if it had perfect knowledge and perfect motivation? In the first place, we should expect that each and every statute would expand the total size of the economic pie. There would be no reason for the legislature to adopt any rule that would cost the losers more than it would provide to the winners. The allocative losses involved are losses that are imposed on someone, and a legislature with perfect knowledge would know that these losses exist, and one with perfect motivation would never wish to inflict them gratuitously. Instead the legislature would adopt only those proposals that produced a net benefit for the citizenry at large. Markets would be allowed to operate where they functioned well; where they did not, they would only be restrained by the best possible system of legislation.

Thus the first consequence of this system is that each public transaction would produce a net social gain; that is, the legislature would achieve Kaldor-Hicks optimality. n35 The Takings Clause, however, is concerned not only with the size of the gain, but also [*52] with its distribution. It is designed to ensure that any allocative improvements introduced by the legislature do not suffer from attendant distributive dislocations. In other words, the Just Compensation Clause contemplates the Pareto standard of optimality, n36 not the Kaldor-Hicks standard. n37

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n35 Under the Kaldor-Hicks standard of optimality, a transaction is judged to be efficient only if it produces a net gain, whether or not it improves the economic position of each individual party to the transaction.

n36 Under the Pareto standard of optimality, a transaction is judged to be efficient if it improves, or at least does not worsen, the economic position of each individual party to the transaction.

n37 Thus a transaction which achieves Kaldor-Hicks optimality, but which worsens the economic position of one or more parties to the transaction, can only achieve Pareto optimality if the winners then compensate the losers.

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But if the legislature is knowledgeable and benevolent, it will also make the right allocative decision in every case; it will achieve Pareto optimality as well. Even if there are losers under one statute, it is likely that they will be the winners in the next, for the benevolent legislature will not favor one class of citizens over another. As the number of contexts in which legislation is passed increases, the odds that any person will be a net loser over the full set of transactions is reduced asymptotically to zero. n38 Given that the winners and losers in each case are randomly selected from the whole, it follows that there is no need for the winners to compensate the losers in any individual transaction. It also follows that the legislature will not even have to pay the administrative costs of calculating losses and gains in each case: It knows it will achieve Pareto optimality over time and across statutes, and so it can dispense with the entire process of valuation and side payments.

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n38 See Epstein, 12 Harv J L & Pub Pol at 746 & n 60 (cited in note 34).

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The motivation for the Takings Clause must come from a fear that the legislature has imperfect knowledge, imperfect motives, or both. The power to coerce is enormous, and there is the risk that it will be used to benefit those who possess it at the cost of those who suffer from it. One reason to dislike theft is that it has the tendency to move goods from high to low value uses with positive administrative costs. The same dangers inhere in legislation under a system of majority rule. The Just Compensation Clause requires payment for the taking as a means of disciplining the legislature. If the legislature can afford to pay when it takes, then the fact of compensation itself gives some reason to believe in the net social gain. The clause therefore is designed to prevent allocative losses through collective action, and that problem only arises if the legislature has imperfect knowledge or imperfect motivations. Without legislative abuse, there would be no need to insist upon compensation.

[*53] On the other side of the coin, the Just Compensation Clause also eliminates the need for the judiciary to compare what the public gains from the statute with what the individual property owner loses. The danger of legislative abuse invites judicial oversight of the legislature. A compensation test thus becomes necessary in order to reduce the otherwise horrendous pressures on the judicial system to sort out which government interventions are justified and which are not. But the courts have access to little information about what kinds of transactions benefit the public, and, by definition, cannot trust any information on that score provided by the state. On the other hand, the courts can get tolerable measures of individual losses in a wide range of cases, or can find some structural reason in the even distribution of benefits and burdens n39 to obviate the need for direct measurement of public benefit in each case. The constitutional articulation of a just compensation standard is not equivalent to a "taking with good cause" standard. It is invoked not only to secure justice to the individual, but also to combat the untrustworthiness of government officials.

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n39 See the discussion of disproportionate impact tests in Epstein, Takings at 204-09 (cited in note 2).

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2. Distrust and the Free Speech Clause.

The analysis of distrust under the First Amendment is similar. It is often said that the First Amendment is designed to serve other values: to encourage participation in good government; to ensure that a diversity of viewpoints are expressed; to enable personal self-realization. n40 The control of legislative abuse is thought to be only one value among many, and a late entry into the pantheon at that.

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n40 See text accompanying note 31.

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But again suppose that there were no fear of abuse, so that the legislature passed speech laws with perfect knowledge and benevolent motives. Why then the concern? The ideal legislature would be as concerned with individual self-realization as any court, and it would better know how to achieve it. If collective support for speech were necessary, the legislature would provide the proper subsidies to the proper persons in the proper amounts. It would promote the necessary diversity of opinions and provide the information necessary to facilitate good individual choices. But, if restrictions on speech were necessary to facilitate the right choices, the legislature would also provide them. Quite simply, the good [*54] and knowledgeable legislature wants what the learned scholars of constitutional law want. If we had no cause to distrust the legislature, then we could dispense with the costly and inconvenient apparatus of judicial review of the First Amendment, and could rely upon Meiklejohn's good citizens to reach the right result every time. n41 His version of the "good man" calls for a celebration of free speech, but gives no reason why speech needs or should receive constitutional protection.

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n41 See Alexander Meiklejohn, Political Freedom: The Constitutional Powers of the People (Harper, 1960) (originally published in 1948). As Vincent Blasi has noted, Meiklejohn's participation theory treats government as a large town meeting, composed of virtuous citizens who participate for the common good. Blasi, 1977 Am Bar Found Res J at 554-67 (cited in note 24). Meiklejohn's virtuous citizen is the antithesis of the "bad man" of whom Holmes wrote in Oliver Wendell Holmes, Jr., The Path of the Law, 10 Harv L Rev 457 (1897). Of Holmes, Meiklejohn said:

As against the dogma of Mr. Holmes I would venture to assert the counterdogma that one cannot understand the basic purposes of our Constitution as a judge or a citizen should understand them, unless one sees them as a good man, a man who, in his political activities, is not merely fighting for what, under the law, he can get, but is eagerly and generously serving the common welfare.

Blasi, 1977 Am Bar Found Res J at 557 (cited in note 24) (quoting Meiklejohn, Political Freedom at 66).

The asserted separation between the private and public self adumbrates many of the themes prominent in the republican revival of the 1980s. See, for example, Frank I. Michelman, Foreword: Traces of Self-Government, 100 Harv L Rev 4 (1986); Cass R. Sunstein, Beyond the Republican Revival, 97 Yale L J 1539 (1988). For criticism, see also Richard A. Epstein, Modern Republicanism -- Or the Flight From Substance, 97 Yale L J 1633 (1988).

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Yet we do not take Meiklejohn's carefree attitude, and abuse of public office is the only reason for political aspiration to be transferred into constitutional protection. From virtuous legislators there is little to fear, and it is doubtful that the First Amendment will constrain them in any meaningful way. But bad legislators in power have a tendency to stay in power. Just as they will steal, there is a risk that they will stifle criticism, rig debate, and disseminate falsehoods to achieve their ends. It is to them, or to their control, that the First Amendment is dedicated.

But why trust the judges, who are subject to imperfections of their own? The answer is that there is no system of perfect control, and judicial review is simply part of the better overall strategy to curb abuse. The reason is that judicial review is another mechanism that provides for a division of power. With judicial review in place, any piece of legislation has to clear an additional hurdle--which is good, because the presumption of distrust translates into the belief that more rather than less legislation is the greater danger. But there should be no illusion: If all branches of government [*55] have unsound beliefs or corrupt motives, then the additional division of power brought on by judicial review still will not alter any flawed outcomes achieved by the legislative process alone. The protection of private property and economic liberties fails today solely because no branch in our government -- legislative or judicial -- accords them the same weight that they had in the original constitutional scheme.

B. Mutual Reinforcement of Property and Speech Rights

In light of distrust, we should be very leery indeed of any proposals, such as those advanced recently by Owen Fiss, n42 that wish to reduce the protection of freedom of speech to the paltry level now afforded economic liberties. Fiss is correct to see that the basic assumptions about the behavior of government and private officials are as important to the interpretation of the First Amendment as they are to the Fifth. But he sadly underestimates the capacity for legislative abuse that lies in both these areas. The endless machinations of the Federal Communications Commission, a body which regulates both speech and property rights in the spectrum of broadcast frequencies, offer, it seems fair to say, no reason to believe that a system of extensive government regulation would improve the level of political discourse in this country. n43 A simpler strategy that would charge the government with the enforcement of property rights, by actions against interference, is far superior to endless administrative wrangles to decide which groups should receive public subsidies for what activities.

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n42 See Owen M. Fiss, Free Speech and Social Structure, 71 Iowa L Rev 1405 (1986); Owen M. Fiss, Why the State?, 100 Harv L Rev 781 (1987).

n43 The most influential criticism of the FCC is still R.H. Coase, The Federal Communication Commission, 2 J L & Econ 1 (1959). Coase's work could not have anticipated the developments of the past thirty years, during which the level of government performance has been every bit as dismal. See also Jonathan W. Emord, Freedom, Technology, and the First Amendment (Pacific Research Institute for Public Policy, 1991); Thomas W. Hazlett, The Rationality of U.S. Regulation of the Broadcast Spectrum, 33 J L & Econ 133, 133-34 (1990).

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The government necessarily holds a monopoly over force. While large private organizations may develop, their net worth is not a measure of their political power, so long as they can acquire property and influence only by consent and not by coercion. In antitrust law, the size of a firm is not evidence of its market power, and the same conclusion holds for constitutional theory. Let there be many large and powerful voices: They will not speak in unison; and in any event, they will have to pay for what they wish to say. [*56] So long as there are secure property rights in the press (which there currently are not in broadcasting), then entry will be at low cost and many possible voices will be heard, checking influence with influence and power with power. The great mistake of socialism is to equate the risks of a rich market actor with those of the sole government actor. We should not repeat that mistake as a matter of modern constitutional theory.

1. Limiting factionalism through property rights.

All this is not to say that there is no danger today to our First Amendment rights. There is, but it comes from a source not usually cited. The current laws make it impossible to have well-defined property rights in anything. While possession of property may be secure against government removal, the use and disposition of virtually any asset is fair game for obstruction by the political process, whether through taxation or regulation. That political power sparks private lobbyists to petition government not only for the redress of grievances but also for partisan advantage, and legislators can demand their pound of flesh in return. n44

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n44 For a brief but foreful statement, see Fred S. McChesney, Rent Extraction and Rent Creation in the Economic Theory of Regulation, 16 J Legal Stud 101 (1987). The contrast between McChesney and Meiklejohn is manifest.

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Within this environment, more speech is not better. Freedom of speech allows factions to organize and mobilize in order to obtain wealth transfers through taxation or regulation; thus freedom of speech only reduces overall social wealth and security. The fierce battles fought by single issue political action groups of all stripes and persuasions are strong evidence of an overheated and wasteful political system in decline. It is partly for this reason that there

is such a prevalent desire to control campaign expenditures, a practice which nevertheless has proved fitful and counter-productive. n45

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n45 See, for example, Buckley v Valeo, 424 US 1 (1976). I develop this theme further in Epstein, 97 Yale L J at 1643-45 (cited in note 41).

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Yet here the right solution is not to restrict the liberty to speak or to lobby, given the additional risk of government abuse that would be created. It is rather to reduce the power of government to transfer wealth and dispense favors. Once the government to transfer wealth and dispense favors. Once the government cannot do the bidding of the interest groups who crowd its corridors, these groups will devote their efforts to more socially productive activities. The compression of the set of permissible government tasks will indirectly, but effectively, improve the level of [*57] public discourse both by changing the items on the public agenda and by redirecting the resources that are used to obtain them. In short, when viewed in isolation, expansive protection of freedom of speech is neither a good nor a bad. It becomes an unambiguous good only when paired up with a system of limited government and strong property rights.

2. Eliminating "incidental" burdens on speech through property rights.

The structure of property rights influences the patterns of speech and discourse in yet another fashion. It is accepted hornbook law that the First Amendment does not cover regulations of private property that have only an incidental effect upon speech, no matter how large that incidental effect. n46 Of course, it is understandable that the Supreme Court would adopt a rule of this sort, since it has already decided to scrap any extensive constitutional protection for property rights. It has to police the undeniable friction that takes place at the property/speech frontier. Otherwise, the Court is in danger of indirectly undoing all forms of property regulation in the name of free speech.

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n46 See Frank I. Michelman, Liberties, Fair Values, and Constitutional Method, 59 U Chi L Rev 91, 112 (1992).

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This danger is sufficiently great that indirect burdens may be placed on speech so long as the restriction passes nondiscrimination and intent tests. The nondiscrimination test requires that the restriction be imposed upon activities both unrelated and related to speech. The intent test requires that the government not disguis its real purpose to attack speech through the regulation in question.

The net effect of this regime is to countenance a very large reduction in the amount and quality of speech that reaches the public. I have two favorite recent examples of this problem. The first is that of the New York newspapers. Under the above two-pronged test, the government can require newspapers (whose

editorial content cannot otherwise be regulated) to negotiate with unions under the National Labor Relations Act. As a result, the New York Times has been locked in extensive negotiations with its unions over work crews and job assignments for its modern New Jersey plant, which is capable of printing colored pictures. n47 Similarly, the New York Daily News has been caught in bitter union [*58] strikes, which have resulted in violence, disrupted its service, and eventually forced the sale of the Daily News in order to escape labor negotiations. n48 The second example, which involves both religion and speech, is that of St. Bartholomew's Church in New York. Under the two-pronged test, the government can subject private organizations such as churches to zoning laws which restrict their ability to sell their property. As a result, St. Bartholomew's has been driven toward bankruptcy because it cannot sell or develop its valuable real estate, which has been declared a landmark by the city of New York. n49 In all of these cases, the courts have refused to single out the press (or religion) for special treatment, determining that the consequences of the regulations, while large, were nonetheless "incidental." n50

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n47 See New York Times Reaches Agreement with Union, Reuters Bus Rep (Dec 12, 1991).

n48 See David E. Pitt, News Having Trouble Getting Paper Out, NY Times B4 (Oct 29, 1990).

n49 See St. Bartholomew's Church v City of New York, 914 F2d 348 (2d Cir 1990) (upholding New York City's landmark law against Free Exercise Clause and Takings Clause challenges).

n50 Id at 355.

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But of course in real life the consequences are more than "incidental." And a stronger system of property protection would have obviated these consequences. All firms would be free to decide the workers to whom they wish to offer jobs, and all landowners would be able to develop their property, subject to the ordinary constraints of nuisance law, without having first to obtain state approval. A greater level of constitutional protection for property rights would prevent the doctrine of incidental effects from stifling constitutional protection of free speech. Indeed, a unified conception of speech and property would leave no place at all for the doctrine of incidental effects under the First Amendment, which is all to the good. That doctrine is but a concession to the reality that there are great losses that must go unredressed -- it counts as a point in favor of a unified theory that it can dispense with so unsatisfactory a conception.

A system which protects private property rights, driven by a universal conception of distrust, thus improves speech in two directions. First, it undermines the incentives for unproductive factional speech by eliminating the gains from factional politics. Second, it reduces the cost of the speech that is left, by protecting speech against the incidental burdens of property regulation. And it does both without increasing the dangers of central government control.

[*59] Constitutional law has gone badly astray in creating the massive divide between speech and property. In order to show just how badly off course it has gone, it is useful to examine the doctrinal underpinnings in both speech and takings law. In that light, my views in Takings n51 will not seem fanciful, idealistic, utopian or anachronistic, for they represent a point-by-point extension to the Takings Clause of much of First Amendment law. The successes of the First Amendment can, and should, point the way to the revitalization of takings law.

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n51 Epstein, Takings (cited in note 2).

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III. PROPERTY AND SPEECH: DOCTRINAL PARALLELS

Presently, the great divide between property and speech rests on differing conceptions of distrust in each doctrinal area. The postulate of distrust drives the law of freedom of speech and, with some exceptions, has led the Court to create a coherent and powerful intellectual structure. The opposite presumption of legislative knowledge and probity has led to a continuous judicial horror show with respect to economic liberties and private property, in which judges strain to avoid the literal meaning of constitutional provisions in order to obtain indefensible doctrinal results.

Nonetheless, the possibility of parallel construction of the Free Speech and Takings Clauses should be evident in the parallelism of the questions that arise under both of the clauses: First, what is the scope of the substantive interest to be protected? Second, what government acts violate that interest? Third, what might justify the state in violating that interest? Fourth, what is the remedy for the violation of that interest? Fifth, and perhaps surprisingly for the First Amendment, when does the just compensation principle allow the state to force an exchange?

These five questions are precisely parallel to those that arise in any private law discourse: What is the protected interest? What is the defendant's wrong? What justification can the defendant offer for the prima facie violation of the interest? What is the remedy for the private wrong? When does the libertarian principle yield to forced exchanges? n52 Essentially every substantive question in public law can be organized around these five issues. But the range of response may be so different, and parallel interests [*60] (speech or property) subject to such divergent legal rules, that it becomes all too easy to forget that the logical structure of the inquiries in both areas is the same.

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n52 One example of a forced exchange is the case of private necessity. See Vincent v Lake Erie Transportation Co., 109 Minn 456, 124 NW 221 (1910). The parallels between conditional privilege and the Just Compensation Clause were developed in Dale W. Broeder, Torts and Just Compensation: Some Personal Reflections, 17 Hastings L J 217 (1965).

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A. Question One: The Scope of Speech and Property Rights

The first salient point in comparing speech to property rights is how much broader the coverage is that is given to freedom of speech. Coverage of speech is broader in at least two separate ways. First, it is clear that First Amendment jurisprudence correctly sweeps into its fold all forms of activities whose central mission is to communicate not only ideas and information, but also attitudes, sentiments and feelings. It goes without saying that the First Amendment covers political speech, but it covers artistic and literary expression as well. Similarly, without real tussle, the modern media -- for example, fax machines, broadcasts, and electronic mail -- are as strongly protected by the First Amendment as the traditional printing press. Finally, even such activities as flag burning n53 and nude dancing n54 fall within the purview of the First Amendment. There are some qualifications to the doctrine: Under current theory commercial speech tends to receive lower levels of protection than political speech, although for reasons that should be regarded as insufficient once the connections between speech and property are suitably identified. n55 And certain other forms of speech, such as fighting words and obscenity, are subject to government regulation. But rarely does the Court pretend that expressive activities are outside the sphere of First Amendment consideration altogether.

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n53 See Texas v Johnson, 491 US 397 (1989).

n54 See Barnes v Glen Theatre, 111 S Ct 2456 (1991). See also text accompanying note 116.

n55 See, for example, Chaplinsky v Hampshire, 315 US 568 (1942).

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Second, constitutional scholars have strained to fit as much expressive activity as possible under the First Amendment. Thomas Emerson's influential theoretical treatment, The System of Freedom of Expression, quite consciously substitutes in the broader term "expression" for the narrower term "speech." n56 While the expansion of coverage makes good sense, I believe that Emerson's basic structure is wrong in one critical respect: The linguistic move from speech to expression does not remove the need to explain [*61] why certain forms of communication are entitled to absolute immunity from state control. The public justification for restricting speech has to be fought out in terms of the validity of claims made by the state, and not on the strength of a classificatory scheme that looks only to one side of the equation.

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n56 Emerson, The System of Freedom of Expression (cited in note 24). Many have picked up the phrase "freedom of expression." See, for example, Stone, et al, Constitutional Law at 1011 (cited in note 7).

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The third question about a constitutional right -- the state justification for intruding upon the protected interest -- cannot be collapsed, without serious loss of intellectual clarity, into the first question -- the scope of that right. Yet that is precisely the wrong move that Emerson makes at the outset of his study when he tries to force the complex system of rules regulating communication into the single distinction between "action" and "expression," in which the former is subject to "vastly" more regulation than the latter. n57 Nevertheless, the broad coverage which Emerson affords speech is surely welcome, for the wide net breathes life into the central proposition of limited government -- that all government activities should be evaluated under a presumption of distrust.

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n57 Emerson, The System of Freedom of Expression at 8 (cited in note 24). After noting the line-drawing difficulties, Emerson concluded:

But the crucial point is that the focus of inquiry must be directed toward ascertaining what is expression, and therefore to be given the protection of expression, and what is action, and thus subject to regulation as such.

Id at 18. Earlier he had noted that, in order to achieve its desired goals, a society or the state is entitled to exercise control over action -- whether by prohibiting or compelling it -- on an entirely different and vastly more extensive basis.

Id at 8. Emerson, very much a product of the New Deal, did not perceive any serious tension between his authoritarian politics and his libertarian views on speech -- an inveterate distinction that I hope to undermine, if not overturn, here.

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The same broad coverage is not given to private property under the Fifth Amendment, but should be. "Private property," like "freedom of speech," is a term of comprehensive import, which surely must be understood to cover more than the rights in land that were well established under the common law of estates. Just as the First Amendment protects (or should protect) the freedom of speech over the airwaves, so too should the Fifth Amendment protect any property rights that individuals acquire in the air rights, ideally through a system of first possession. n58 Similarly, the [*62] Takings Clause should protect those forms of property which in some sense are dependent not only upon natural acquisition by individuals, but also upon government recognition, most notably intellectual property -- copyrights, patents, trademarks, trade secrets and the like. Likewise, the Takings Clause should protect special forms of property in traditional assets, like time-sharing plans, just as much as it protects traditional forms of property.

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n58 Today the government owns the airwaves, which many think allows the government to control how the spectrum is used or allocated. See National Broadcasting Co. v United States, 319 US 190 (1943); Red Lion Broadcasting Co. v FCC, 395 US 367 (1969). Historically, however, the government did not own the airwaves until after it displaced the spectrum rights originally appropriated

through first possession. See Coase, 2 J L & Econ at 1-7 (cited in note 43); Emord, Freedom, Technology, and the First Amendment at 138-65 (cited in note 43). For a critism of the Court's decision in Red Lion and CBS v Democratic National Committee, 412 US 94 (1973), see Blasi, 1977 Am Bar Found Res J at 611-31 (cited in note 24). Blasi stresses the power that a free press can have in checking governmental power. Id at 621. This suggests that easy access to the airwaves (no broadcast rights) will sometimes advance the checking value. Id at 625. Note too that Emerson calls for extensive social control over licensees, to the ostensible benefit of the public. See Emerson, The System of Freedom of Expression at 660-67 (cited in note 24). But his discussion makes no reference to Coase, and utterly ignores the difference between allocating frequencies, by protecting broadcasts against physical interference, and ordinary content regulation, which should excite serious First Amendment attention.

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Moreover, the definition of property under the Takings Clause is unjustifiably narrower than under analogous private law doctrine. For example, the Takings Clause does not generally protect "good will." But tort law protects goodwill against destruction, and contract law permits private parties to transfer goodwill by legally enforceable agreement. n59 The unwillingness of the courts to recognize goodwill as an independent item of property, or at least as an element of already recognized business property, represents a true constitutional injustice. n60

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n59 See, for example, Community Redevelopment Agency of Los Angeles v Abrams, 126 Cal Rptr 473, 543 P2d 905 (1975). For criticism of the modern view, see Gideon Kanner, When is "Property" not "Property Itself": A Critical Examination of the Bases of Denial of Compensation for Loss of Goodwill in Eminent Domain, 6 Cal W L Rev 57 (1969).

n60 See, for example, the notorious "Poletown" case, Poletown Neighborhood Council v City of Detroit, 410 Mich 616, 304 NW 455 (1981). There the court's failure to take into account loss of neighborhood goodwill led the court to sustain a takeover of a neighborhood by General Motors that ignored huge elements of losses to the private owners who were dispossessed.

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The rationale for this untoward result is conceptual and unsatisfying. It is said that the government only takes ongoing business property that it uses, and not that which it destroys. But recall Blackstone's general injunction that the purpose of compensation when government operates under its power of eminent domain is to ensure that the private holder is not left worse off by the coercive exercise of government power than he was before. n61 That objective can only be accomplished if the government must compensate for property destroyed. It surely ought not [*63] make a legal difference if the government destroys a house before it condemns a piece of land instead of condemning the land before destroying the house. The goodwill associated with real property, or even with an ongoing business, should be brought within the scope of the Takings Clause. Unfortunately, courts today, too eager to protect the budgets of municipal governments, allow them to wreak destruction of valuable private assets for